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In the Supreme Court of the United States

OCTOBER TERM, 1980

PATRICIA ROBERTS HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ANN HANSEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Secretary of Health and Human Services may be equitably estopped from denying Social Security Act benefits to a claimant who fails to satisfy the requirements of the statute.

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The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-47a) is reported at 619 F.2d 942. The opinions of the district court (App. E, *infra*, 51a-56a), the Social Security Appeals Council (App. F, *infra*, 57a-58a), and the Administrative Law Judge (App. G, *infra*, 59a-74a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 48a) was entered on March 24, 1980. A petition for rehearing was denied on September 16, 1980 (Apps. C & D, *infra*, 49a-50a). On December 9, 1980, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including January 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

1. Section 202(g)(1) of the Social Security Act, as amended, 42 U.S.C. 402(g)(1), provides in pertinent part:

> (g)(1) The widow and every surviving divorced mother (as defined in section 416(d) of this title) of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—

(A) is not married,

(B) is not entitled to a widow's insurance benefit

(C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,

(D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, and

(F) in the case of a surviving divorced mother—

(i) the child referred to in subparagraph (E) is her son, daughter, or legally adopted child, and

(ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income,

shall (subject to subsection (s) of this section) be entitled to a mother's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits * * *.

2. Section 202(j)(1) of the Social Security Act, as amended, 42 U.S.C. (Supp. III) 402(j)(1), provides:

(j) (1) Subject to the limitations contained in paragraph (4), an individual who would have been entitled to a benefit under subsections (a) to (g), or (h) of this section for any month after August 1950 had he filed application therefor prior to the end of such month shall be entitled to such benefit for such month if he files application therefor prior to the end of the twelfth month immediately succeeding such month. Any benefit under this subchapter for a month prior to the month in which application is filed shall be reduced, to any extent that may be necessary, so that it will not render erroneous any benefit which, before the filing of such application, the Secretary has certified for payment for such prior month.

3. 20 C.F.R. 404.601 (1974) provides in pertinent part:[1]

(c) *Application defined.* Unless otherwise specified, the term "application" refers only to an application on a form prescribed in § 404.602, and includes an application for monthly benefits, a lump-sum death payment, a recomputation of a primary insurance amount, and the establishment of a period of disability.

(d) *Filing of application on prescribed form.* Except as provided in §§ 404.611, 404.613, and 404.614, an individual has not "filed an application" for purposes of sections 202, 216(i), or 223, of the Act * * * until an application on a form prescribed in § 404.602 has been filed in accordance with the regulations in this subpart.

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[1] These provisions were recodified in simplified form, without substantive change, effective June 26, 1979. See 44 Fed. Reg. 37207, 37209-37210 (1979); 20 C.F.R. 404.602-404.614.

STATEMENT

1. With some limitations and exceptions, Section 202(g) of the Social Security Act provides that the surviving parent of the child of a deceased wage earner insured under the Act is entitled to monthly benefits based on the deceased's prior earnings. 42 U.S.C. 402(g). See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975).[2] Before January 1, 1973, such benefits were payable only to a parent who was married to, or dependent on, the wage earner at the time of his death. Section 114(c) of the Social Security Amendments of 1972 amended the Act to provide that the surviving divorced parent could receive social security benefits regardless of actual dependency. See Pub. L. No. 92-603, Section 114(c), 86 Stat. 1348; 45 Fed. Reg. 68931 (1980).

Section 202(g)(1) sets forth various requirements regarding eligibility for parent's benefits. In particular, Section 202(g)(1)(D) requires that the claimant "has filed application" for the benefits. 42 U.S.C. 402(g)(1)(D). Section 202(j)(1), in turn, provides that any "individual who would have been entitled to [parent's] benefit[s] * * * for any month after August 1950 had he filed application therefor prior to the end of such month" may receive up to 12 months' retroactive benefits calculated from the date of application. 42 U.S.C. (Supp. III) 402(j)(1). Since 1955, the regulations implementing these provisions have made clear that only a written application will satisfy the "filed application" requirement of Sec-

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[2] In *Wiesenfeld*, the Court concluded that Section 202(g) was unconstitutional insofar as it authorized benefits for surviving mothers but not for surviving fathers. Such "widow's" benefits are now payable to widowers as well. See 20 C.F.R. 404.335-404.337; 45 Fed. Reg. 68931 (1980).

tions 202(g)(1)(D) and 202(j)(1). 20 C.F.R. 404.602, 404.610-404.614; App. A, *infra*, 8a. See, *e.g.*, *Leimbach* v. *Califano*, 596 F.2d 300, 304 (8th Cir. 1979); *Johnson* v. *United States*, 572 F.2d 697 (9th Cir. 1978); *Goff* v. *Weinberger*, Unempl. Ins. Rep. (CCH) ¶ 14,470 (D. Conn. 1975), aff'd mem., 538 F.2d 309 (2d Cir.), cert. denied, 429 U.S. 896 (1976); *Clark* v. *Celebrezze*, 344 F.2d 479 (1st Cir. 1965); *Parker* v. *Finch*, 327 F. Supp. 193 (N.D. Ga. 1971).

2. Respondent, a divorced mother of two whose former husband died in 1967, filed a written application for mother's benefits in May 1975. Pursuant to Section 202(g)(1), the Social Security Administration ("SSA") awarded respondent benefits retroactive to May 1974—the 12-month period prior to her written application. Respondent contended, however, that she was entitled to an additional year's retroactive benefits. She asserted that she had visited the SSA claims office in Newport, Vermont, in May 1974, and had made an oral inquiry about her eligibility for benefits at that time. She further claimed that the SSA representative had incorrectly informed her that she was ineligible. The SSA denied this claim and respondent timely requested a hearing (Tr. 3; App. A, *infra*, 2a, 5a; App. G, *infra*, 61a).

At an evidentiary hearing before an administrative law judge, respondent testified that on June 12, 1974, she met with an SSA field representative at the Newport office for 10-15 minutes.[3] Respondent claimed that she told the agency employee that she was the divorced mother of two boys and that the employee replied that she was ineligible for benefits because she was divorced (App. G, *infra*, 61a-62a; Tr.

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[3] Respondent had previously claimed that this meeting had occurred in May 1974 (Tr. 3; App. A, *infra*, 27a).

5-8). Respondent did not claim, however, that she ever told the representative that her former husband, who would have been 43 years old at that time, was in fact dead (App. A, *infra*, 10a, 27a-29a). Moreover, although the SSA office records show that respondent and her two sons met with a field representative on June 12, the representative, who conducts thousands of interviews annually, was unable to recall the meeting or any conversation that may have occurred (App. G, *infra*, 63a).[4]

Based on this evidence, the ALJ determined that respondent had made an oral inquiry about her eligibility for benefits on June 12, 1974. The ALJ further found that at that meeting, the SSA representative had not "refuse[d] to give [respondent] an application[, but that h]e merely advised [respondent] regarding her eligibility and [that] she decided not to press the issue" until the following year (App. G, *infra*, 64a). Accordingly, the ALJ concluded that respondent had not satisfied the written application requirement for benefits in June 1974 (*id.* at 64a-65a, 73a). In addition, relying on *FCIC* v. *Merrill*, 332 U.S. 380 (1947), and *Goldberg* v. *Weinberger*, 546 F.2d 477 (2d Cir. 1976), cert. denied, 431 U.S. 937 (1977), the ALJ rejected respondent's contention that the SSA should be estopped from requiring a written application because of the representative's incorrect advice regarding her eligibility (App. G, *infra*, 67a-72a). The Social Security Appeals Council affirmed the ALJ's decision (App. F, *infra*, 57a-58a).

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[4] We further note that the office records, which refer to a post-adjudicative inquiry, indicate that respondent discussed her sons' continuing eligibility and not her own (App. A, *infra*, 3a).

3. Respondent pursued her claim for an additional award of retroactive benefits by filing this suit in the United States District Court for the District of Vermont. See 42 U.S.C. 405(g). In April 1979, the district court held that the SSA regulations requiring a written application for benefits are "too restrictive" as applied to this case (App. E, *infra*, 54a). Observing that the claims representative had failed to suggest that respondent file an application to resolve her doubtful eligibility, the court concluded that respondent's oral inquiry constituted a "filed application" within the meaning of Section 202(g)(1)(D) of the Act (App. E, *infra*, 54a-55a). Hence, the district court granted respondent's motion for summary judgment and remanded the case to the Secretary for an additional award of benefits (*id.* at 56a).

On appeal, a divided panel of the court of appeals affirmed on other grounds. The court first held that the SSA regulations requiring a written application are consistent with the statutory language and serve the substantial congressional policy of limiting fraud and confusion in the administration of the Act (App. A, *infra*, 8a-9a). The court therefore concluded that the district court had erroneously disregarded the "valid implementing regulations * * * [merely because] their application appears to be somewhat unfair or particularly onerous" (*id.* at 9a). See also *id.* at 14a (Friendly, J., dissenting).

Although recognizing that, at least in the absence of affirmative misconduct, this Court has never suggested that the government may be estopped (App. A, *infra*, 11a-12a), the court of appeals nevertheless held that the Secretary should be estopped from denying respondent additional retroactive benefits. The

court observed that the claims representative had failed to comply with the SSA internal claims manual, which indicates that a claimant should be encouraged to file an application even in doubtful cases (*id.* at 10a-11a). The court of appeals conceded that the claims manual was not a legally binding regulation and that the representative's omission did not otherwise constitute affirmative misconduct (*id.* at 12a). The court concluded, however, that application of the estoppel doctrine is warranted in these circumstances because, in its view, respondent failed to satisfy an "essentially procedural requirement" for benefits rather than a substantive condition of eligibility (*ibid.*). Rejecting the contrary conclusion of the Eighth Circuit in *Leimbach* v. *Califano*, 596 F.2d 300 (1979), on "facts quite close to the present ones" (App. A, *infra*, 12a), the court held that the government may be estopped "where (a) a procedural not a substantive requirement is involved and (b) an internal procedural manual or guide or some other source of objective standards of conduct exists and supports an inference of misconduct by a Government employee" (*id.* at 14a).[5]

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[5] Judge Newman filed a concurring opinion (App. A, *infra*, 35a-47a). He stated that "when a claimant is within the substantive scope of the pertinent legislative policy, but ineligible because of a procedural default attributable in part to conduct of a government official, the rationale for rejecting estoppel or limiting it to cases of affirmative misconduct disappears" (App. A, *infra*, 39a). Hence, "public policy favors the granting of the benefit, not its denial" in such circumstances, and therefore when a claimant's "failure to observe the procedural requirement is caused by conduct of a government official, an estoppel to prevent the Government from asserting procedural noncompliance means that the substantive legislative policy will be carried out" (*ibid.*). Thus, in Judge Newman's view,

Judge Friendly dissented (App. A, *infra*, 14a-35a). He pointed out (App. A, *infra*, 15a) that "[a] controlling decision of the Supreme Court has established for more than three decades that all courts must 'observe the conditions defined by Congress for charging the public treasury.' *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 385 (1947)." Citing *Montana* v. *Kennedy*, 366 U.S. 308 (1961), and *INS* v. *Hibi*, 414 U.S. 5 (1973), Judge Friendly further observed that subsequent to *Merrill*, the Court had declined to estop the government in far more compelling circumstances than those involved in this "run of the mill" case concerning the extent of retroactive social security benefits (App. A, *infra*, 16a-18a, 26a). Judge Friendly also noted (*id.* at 22a-26a, 35a) that the majority's decision was in conflict with the decisions of several courts of appeals, including *Leimbach* v. *Califano*, *supra*; *Cheers* v. *Secretary of HEW*, 610 F.2d 463 (7th Cir. 1979), cert. denied, No. 79-6856 (Oct. 14, 1980); *Gressley* v. *Califano*, 609 F.2d 1265 (7th Cir. 1979); and *Simon* v. *Califano*, 593 F.2d 121 (9th Cir. 1979).

Judge Friendly stated that such a radical departure from well established precedent was particularly unwarranted in this case. He observed that respondent apparently had not informed the claims representative that her former husband, who would have been only 43 at the time of the interview, was deceased, and that the representative's advice regarding respondent's "ineligibility was thus not wrong on the basis of what he was proved to have known" (App. A, *infra*, 29a). In addition, Judge Friendly asserted that the representative's violation of a non-binding

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the claim representative's "noncompliance with the internal office manual is not a dispositive factor in favor of [respondent's] claim" (*id.* at 42a n.6).

internal claims manual fell far short of constituting affirmative misconduct, and he criticized the distinction between procedural and substantive requirements as unworkable and without merit (*id.* at 33a-34a). Finally, Judge Friendly warned that the majority's decision would subject the public fisc to thousands of claims that the government could not effectively rebut and that would cost the government millions of dollars merely to investigate and process (*id.* at 14a-15a).

On September 16, 1980, the court of appeals denied the government's petition for rehearing with suggestion for rehearing en banc by a 5-5 vote.[6]

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning whether and in what circumstances the government may be equitably estopped. The court of appeals has held that a government employee's allegedly negligent misadvice to a claimant for Social Security Act benefits estops the government from denying benefits to a person who is statutorily ineligible for them, at least where the claimant has failed to satisfy only a "procedural" rather than a "substantive" requirement of law. That decision cannot be reconciled with the long line of precedent in this Court establishing that the government may not be estopped, unless, perhaps, the government has engaged in serious affirmative misconduct. See, *e.g.*, *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Montana* v. *Kennedy*, 366 U.S. 308, 314 (1961);

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[6] Judges Mansfield, Mulligan, Timbers, Van Graafeiland, and Meskill voted in favor of rehearing en banc. Judge Friendly is a senior judge and therefore did not participate in the vote. See 28 U.S.C. 46(c).

FCIC v. *Merrill*, 322 U.S. 380 (1947). In addition, the decision below is in square conflict with the decisions of several other courts of appeals. See, *e.g.*, *Gressley* v. *Califano*, 609 F.2d 1265 (7th Cir. 1979); *Leimbach* v. *Califano*, 596 F.2d 300 (8th Cir. 1979); and *Simon* v. *Califano*, 593 F.2d 121 (9th Cir. 1979). Because the decision of the court of appeals threatens the sound administration of the Social Security program and encourages groundless and unauthorized claims against the public treasury, review by this Court is warranted.

1. a. Since the earliest days of the Nation, this Court has repeatedly and consistently held that the government may not be equitably estopped from enforcing the laws even though private parties may, as a result, suffer hardship in particular cases. See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366, 369-370 (1813); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber National Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *FCIC* v. *Merrill*, 332 U.S. 380, 384 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). Indeed, we are aware of no decision of this Court holding that an estoppel would or should lie against the government in any circumstance.[7]

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[7] In *INS* v. *Hibi*, *supra*, 414 U.S. at 8-9, and *Montana* v. *Kennedy*, *supra*, 366 U.S. at 314-315, the Court declined to

This venerable rule is predicated on the doctrines of sovereign immunity and separation of powers. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *Dixon* v. *United States*, 381 U.S. 68, 73 (1965); *Snyder* v. *Buck*, 340 U.S. 15, 19 (1950); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-688 (1949); *United States* v. *San Francisco*, 310 U.S. 16, 29-32 (1940). If the judiciary were free to impose otherwise unauthorized liability on the government based simply on its notions of equity, the sovereign would be virtually powerless to control and protect the public fisc. See, *e.g.*, *FCIC* v. *Merrill*, *supra*, 332 U.S. at 385; *Lee* v. *Munroe & Thornton*, *supra*, 11 U.S. (7 Cranch) at 369-370. Accordingly, it is well settled that "all courts [must] observe the conditions defined by Congress for charging the public treasury." *FCIC* v. *Merrill*, *supra*, 332 U.S. at 385. The decision of the court of appeals strays far from these principles.

As a condition for obtaining Social Security benefits, Congress has long required that a claimant file an application. See, *e.g.*, *Leimbach* v. *Califano*, *supra*, 596 F.2d at 303-304; *Johnson* v. *United States*, 572 F.2d 697, 699 (9th Cir. 1978); *Clark* v. *Celebrezze*, 344 F.2d 479, 481 (1st Cir. 1965); *Bender* v. *Celebrezze*, 332 F.2d 113, 115 (7th Cir. 1964); *Coy* v. *Folsom*, 228 F.2d 276, 278-279 (3d Cir. 1955); H.R. Rep. No. 728, 76th Cong., 1st Sess. 35 (1939). The requirement of a written application reduces the

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determine whether the government would be estopped from denying citizenship in a case involving serious affirmative misconduct on the government's part. As the court of appeals recognized (App. A, *infra*, 12a) and as we discuss below (see pages 14-15, *infra*), this case does not involve affirmative misconduct.

"possibility of fraud, confusion and laxity" in the administration of the Act. App. A, *infra*, 9a; *Leimbach* v. *Califano*, *supra*, 596 F.2d at 303-304. At the same time, Congress has recognized that many claimants may not file for benefits immediately upon becoming eligible and has therefore provided for retroactive benefits limited to the 12-month period prior to filing. Particularly because, as Judge Friendly recognized (App. A, *infra*, 15a), the government has no effective means of refuting claims based on alleged oral applications, the decision of the court of appeals substantially undermines the congressional limitations and restrictions placed on entitlement to social security benefits.

b. The court of appeals concluded that the Secretary should be estopped from denying respondent benefits because the SSA claims representative misinformed her about her eligibility and failed to encourage her to file an application.[8] But this Court has repeatedly held that even substantial detrimental reliance on a government official's misinformation does not give rise to an estoppel. In *FCIC* v. *Merrill*, *supra*, for example, a government agent incorrectly informed a wheat farmer that a certain kind of planting would be insured under the Federal Crop

[8] Two judges of the court of appeals correctly concluded that the representative's apparent violation of the internal claims manual is not dispositive (App. A, *infra*, 19a-30a, 42a n.6). See pages 8-9 note 5, *supra*. This unpublished housekeeping manual, which is 13 volumes and 8,000 pages in length, is not a legally binding regulation. See *United States* v. *Caceres*, 440 U.S. 741 (1979); 5 U.S.C. 553. Moreover, holding an agency to a higher standard because it issues instructions and guidelines for its employees would have the deleterious effect of discouraging the promulgation of such guidelines. See *United States* v. *Caceres*, *supra*, 440 U.S. at 755-756.

Insurance Act. See 332 U.S. at 382. Relying on this information, the farmer planted his wheat crop, which was subsequently destroyed. This Court held that the government could not be estopped from denying insurance benefits to the farmer, because the crop was in fact not insurable under the FCIC's regulations. See also, *e.g.*, *Montana* v. *Kennedy*, *supra*, 366 U.S. at 314-315 (detrimental reliance on official misinformation results in loss of citizenship); *Dixon* v. *United States*, *supra*, 381 U.S. at 73 (detrimental reliance on erroneous tax ruling); *United States* v. *San Francisco*, *supra*, 310 U.S. at 32 (detrimental reliance on erroneous administrative rulings results in loss of land).

A fortiori, there is no basis for an estoppel in this case. At worst, the SSA field representative negligently, but in good faith, misinformed respondent because he was apparently unaware of a recent change in the law. See page 4, *supra*. Alternatively, the field representative's mistake may well have been attributable to respondent's failure to inform him that her former husband, who would have been only 43 in 1974, had died in 1967. See App. A, *infra*, 10a, 28a-29a. Furthermore, respondent's reliance on this misstatement was not irrevocable, as was the case in *Merrill*: she was not prevented from filing an application for benefits, and she in fact did so within a year. Finally, respondent's actual award of retroactive benefits under Section 202(j)(1) covers the date of her oral inquiry; her only loss concerns additional retroactive benefits prior to the 12-month period of limitations. See *Simon* v. *Califano*, *supra*, 593 F.2d at 123. In sum, even if there should be an exception to the established rule against estopping the government, "it would be hard to find a spongier factual launching pad for the" court of appeals' de-

parture from prior precedent. App. A, *infra*, 26a-27a (Friendly, J., dissenting).

c. The court of appeals' erroneous application of estoppel principles cannot be justified on the ground that respondent failed to satisfy a "procedural" rather than a "substantive" requirement of the Social Security Act. At the outset, we submit that, as several courts of appeals have concluded, the filing requirement under the Act is a "substantive condition of eligibility." *Johnson* v. *United States*, *supra*, 572 F.2d at 699. See, *e.g.*, *Cheers* v. *Secretary of HEW*, 610 F.2d 463, 466-467 (7th Cir. 1979), cert. denied, No. 79-6856 (Oct. 14, 1980); *Simon* v. *Califano*, *supra*, 593 F.2d at 122; *Clark* v. *Celebrezze*, *supra*, 344 F.2d at 481; *Bender* v. *Celebrezze*, *supra*; *Coy* v. *Folsom*, *supra*, 228 F.2d at 278-279. In addition, the 12-month limitation period also at issue in this case is a substantive limitation on the right to benefits created by Congress. Indeed, just last Term, this Court emphasized that the statute of limitations accompanying a waiver of sovereign immunity "is a condition of that waiver" that may not be extended or ignored. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979) (construing statute of limitations under the Federal Tort Claims Act, 28 U.S.C. 2401(b)). Cf. *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-109 (1945).

In any event, this Court has repeatedly declined to estop the government with regard to arguably "procedural" requirements and limitations. For example, in *INS* v. *Hibi*, *supra*, a Filipino soldier who had served the United States in World War II was "substantively" entitled to become a United States citizen under a special Act of Congress. Notwithstanding allegations that the government intentionally failed to notify the soldier of his rights or to provide him

with the means to apply for naturalization, the Court held that the government was not estopped from denying the soldier citizenship because of his failure to file a timely application.[9] And in *Snyder* v. *Buck*, *supra*, 340 U.S. at 19, the Court held that the government could not be estopped from relying on a procedural provision concerning timely substitution of parties. See also *Rock Island, Arkansas & Louisiana Railroad Co.* v. *United States*, 254 U.S. 141, 143 (1920).

2. As the court of appeals apparently recognized (see App. A, *infra*, 12a-13a, 22a-26a, 41a n.4), its decision is in direct conflict with the decisions of several other courts of appeals. For example, in *Leimbach* v. *Califano*, *supra*, 596 F.2d at 304-305, a widower made several oral inquiries at an SSA office between 1968 and 1972 about the eligibility of his children for social security benefits. On each occasion, he was erroneously informed that they were not eligible, and, like respondent, he initially decided not to file a written application. See 596 F.2d at 302.[10] Eventually, in June 1975, Leimbach filed a written application for benefits on his children's behalf and received 12 months' retroactive benefits pursuant to Section 202(j)(1) of the Act, 42 U.S.C.

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[9] Justice Douglas dissented, stating that the Court's decision would "frustrate the congressional purpose and * * * deny substantive rights" under the Act. 414 U.S. at 11. In holding that application of estoppel in this case "would fulfill the fundamental legislative goal to grant [respondent] the benefits she seeks" (App. A, *infra*, 12a), the court of appeals has apparently followed the dissenting opinion in *Hibi* and not the Court's decision.

[10] In fact, on one occasion Leimbach was told that there was no purpose to his filing an application—a substantially more egregious misstatement than was made to respondent. See 596 F.2d at 305.

402(j)(1). In rejecting the widower's claim for additional benefits, the court of appeals held that he had not satisfied the written application requirement until June 1975 (596 F.2d at 302-304), and it observed that its decision was "in accord with the general rule that estoppel will not lie against the government for the misrepresentations of its agents" (*id.* at 305).

Similarly, the Seventh and Ninth Circuits have concluded that the Secretary may not be estopped from denying benefits to claimants merely because an SSA representative misinformed the claimant or otherwise negligently handled his claim. Thus, in *Simon* v. *Califano, supra,* an SSA trainee who aided the claimant in filling out an application erroneously indicated on the form that the claimant had no children. When this error was discovered several years later, the claimant argued that the government should be estopped from denying retroactive benefits to her children. The Ninth Circuit held, however, that "the doctrine of equitable estoppel may still not be invoked against the government" merely because a government official has been negligent. 593 F.2d at 123. Likewise, the Seventh Circuit recently reaffirmed that a claimant's detrimental "reliance on misinformation provided by a Government employee does not provide a basis for an estoppel." *Gressley* v. *Califano, supra,* 609 F.2d at 1267. See also *Cheers* v. *Secretary of HEW, supra,* 610 F.2d at 468-469.

3. The estoppel issue presented by this case is important. The Department of Health and Human Services, through its 80,000 employees, processes millions of claims and conducts innumerable oral interviews each year. See *Califano* v. *Boles,* 443 U.S. 282, 283-285 (1979); Social Security Administration, Office of Management and Administration, *The*

Year in Review: The Administration of Social Security Programs 1978 ii, v, 7, 12-13, 20, 70-74 (1979). As evidenced by the allegations in this case, the Secretary has no effective means of rebutting claims such as respondent's, which are allegedly based on ancient, unrecorded conversations. See App. A, *infra*, 14a-15a. Furthermore, even if the SSA could refute such claims, it would be required to process and investigate such claims at a substantial fiscal and administrative cost. Thus, the decision of the court below will substantially undermine the written application rule that is essential to limiting "fraud, confusion and laxity" in the administration of vast social welfare programs and will result in a flood of litigation involving unverifiable and, often, fraudulent claims. See *Leimbach* v. *Califano*, *supra*, 596 F.2d at 304; *Cheers* v. *Secretary of HEW*, *supra*, 610 F.2d at 466-467.

These harms are not speculative. Relying on the decision of the court of appeals, several district courts within and without the Second Circuit have already remanded cases to the Secretary for hearings regarding alleged oral applications for benefits. Indeed, in *Dziorny* v. *Secretary of HHS*, No. 80-C0729 (E.D.N.Y. Oct. 20, 1980), the district court reversed a denial of retroactive benefits and ordered the Secretary to conduct a hearing about an alleged oral misrepresentation that had occurred 17 years earlier. See also, *e.g.*, *Braunstein* v. *Harris*, 498 F.Supp. 1301 (D.D.C. 1980); *Carpenito* v. *Secretary of HHS*, No. 78-2798-K (D. Mass. May 29, 1980); *Coty* v. *Harris*, 495 F. Supp. 452 (W.D. Va. 1980); *Golau* v. *Secretary of HHS*, No. 79-3192 (D.D.C. May 29, 1980).

In sum, the requirement that an application be made in writing is essential to the efficient operation of social welfare programs as massive as those created by the Social Security Act. It would lead to intolerable burdens, and would require the expenditure of public monies contrary to the dictates of Congress, if claimants could obtain benefits by alleging that they were dissuaded from filing an application by incorrect advice, often from anonymous government employees. As Judge Friendly observed (App. A, *infra*, 14a-15a), the court of appeals has "open[ed] the door of the Federal fisc not simply to [respondent] whom we at least know to have visited the HEW office and said something, but to thousands who merely will make a detailed claim that they have done so and whom there is no effective means of rebutting." The court of appeals' unprecedented and erroneous application of equitable estoppel against the government warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 324, Docket 79-6125

ANN HANSEN, APPELLEE

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

Argued Oct. 26, 1979

Decided March 24, 1980

Before FRIENDLY, OAKES and NEWMAN, Circuit Judges.

OAKES, Circuit Judge:

This appeal does not involve a great deal monetarily: appellee is seeking mother's insurance benefits, as provided in 42 U.S.C. § 402(g)[1] for the year pre-

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[1] 42 U.S.C. § 402(g)(1) provides in pertinent part:

(g)(1) The widow and every surviving divorced mother . . . of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—

(D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died.

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, and

(F) in the case of a surviving divorced mother—

ceding June 12, 1974. Yet the case does raise a significant issue of estoppel against the Government. The Department of Health, Education and Welfare (HEW)[2] appeals from a decision of the United States District Court for the District of Vermont, Albert W. Coffrin, Judge, holding for the applicant and overturning an earlier decision of the administrative law judge that had been upheld by the HEW Appeals Council.

Appellee, whose former husband died in 1967, became eligible for benefits as a divorced mother when the Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329, § 114(c), took effect on January 1, 1973. She did not, however, file the required written application, *see* 42 U.S.C. § 402(g)(1)(D), until May 1975. The estoppel question arises from

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(i) the child referred to in subparagraph (E) is her son, daughter, or legally adopted child, and

(ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income, shall (subject to subsection (s) of this section) be entitled to a mother's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: . . . .

The application of this section to widows but not to widowers was held unconstitutional in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975). Since that time, HEW has by regulation authorized "father's insurance benefits" for widowers, *see* 20 C.F.R. §§ 404.335-.337, but it still apparently grants benefits to "surviving divorced mothers" that are not granted to a surviving divorced father, *id.*

[2] This department has recently been divided, but will be referred to here by its traditional name.

the actions of a Social Security Field Representative who, on June 12, 1974, supplied the applicant with misinformation about her eligibility and did not encourage her to file a written application. On that date, after hearing from a fellow employee and a local attorney that she might be eligible, appellee went with her mother to the Newport, Vermont, Social Security Office. There she had a ten- to fifteen-minute interview with Dan Connelly, the Social Security Field Representative. Connelly does not recall the meeting, but his daily record for June 12, 1974 includes the last names of appellee and her two sons, followed by the notation, "P/AD," which Connelly described as an abbreviation for "post adjudication action." This means that, according to his notes, he was talking to her about a claim that had already been determined adversely. As described in appellee's testimony, however, testimony that was substantially credited by the administrative law judge, the following occurred:

> A. And I went in to file a form for Mother's Benefits—Divorced Mother's Benefits.
>
> Q. All right, now, was he alone there?
>
> A. Yes, he was.
>
> Q. And was it in the morning, or afternoon, or when was it?
>
> A. No—excuse me—but it was in the afternoon, your Honor.
>
> Q. And how long did you spend there?
>
> A. It couldn't have been any longer than between 10 to 15 minutes, if it was that long.
>
> Q. And did you discuss with him anything else other than filing that application?
>
> A. No. He asked who I was, and I told him, "Ann Riegel Hansen" and that my boys had a

claim there, two Riegel boys, and I—I told him that I had heard that I was illegible (sic) for Divorced Mother's Benefits, I was not—

Q. That you were eligible or not?

A. That I was.

Q. All right.

A. And I was there to file a form,—

Q. Uh-huh.

A. —and he—well, I (unintelligible)—

Q. What did he tell you?

A. He asked me—he said, "Were you ever married to the guy?" And I—I just looked at him and—

Q. What'd you tell him?

A. —he repeated the question again, because I was stunned, and I said, "Well, I can cross the street and go over to the City Clerk's office and get you a marriage certificate." And he said, "Oh, no, no," he says, "that won't be necessary."

Q. All right, what else did he say?

A. And then he asked me what my marital statchus (sic) was at the time,—

Q. Uh-huh.

A. —"Were you divorced?" And I said, "Yes," and he said, "Well, that's it," his hands went up in the air, he said, "that's it then, that's why you're not illegible (sic)."

Q. Well, wait, did he say just, "That's it," or what else did he say, as near as you recall, after he said, "That's it," what—what else did he say by way of explanation?

A. He said, "That's it, it's because you're divorced that you're not illegible (sic)."

Q. Did he say that you were not eligible?

A. He said I was not illegible (sic) to file a form for Mother's Benefits.

Q. Now, did he say the words that, "You aren't eligible?"

A. Yes, your Honor.

Q. Or did he just say, "That's it?"

A. He said, "That's it," and he said, "You're not illegible (sic) to file a form because you are divorced at the time."

Q. And did he give you any other explanation?

A. No he didn't.

When the administrative law judge asked appellee how she remembered Connelly's name, she replied, "Because he had given me a rude time." She described Connelly as being "very short, very in a hurry," and said that she was "very put out because of the questions [as to whether she had been married]." Appellee's mother testified that she had gone to the Social Security Office with her daughter and that she had stayed in the waiting room throughout the interview; she remembered that when the daughter had emerged from the office she was "very mad" and "quite upset" about Connelly's inquiry into whether she and her former husband had ever been married. Appellee and her mother left the office without taking further action and appellee made no further contact with the Social Security Administration, or with the lawyer who had suggested that she visit the Social Security Office, until May 1975, when a booklet sent by the Administration and a telephone call confirmed the fact that she was eligible. At that point, she received benefits retroactive one year to May 1974, as provided by 42 U.S.C. § 402(j),[3] but no benefits for any time prior to that date.

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[3] 42 U.S.C. § 402(j)(1) provides in pertinent part:

(j)(1) An individual who would have been entitled to a benefit under subsections (a) to (g) or (h) of this sec-

Relying on the Act and its regulations, the ALJ denied appellee's claim for benefits back to June 1973, finding specifically that Connelly did not refuse in the June 12, 1974 meeting to allow her to file an application and did not advise her that she had no right to do so. But the ALJ also stated:

> [T]he interviewer did not ask her if she wanted to file an application. When she asked him if she should he responded by advising her she was not eligible. She testified she was not given a form by the interviewer, nor did he suggest or encourage her to file one and he didn't explain the advantages of filing an application.

The ALJ found as a matter of law that she failed to comply with the statutory and regulatory requirements for filing of a written application as prescribed in 42 U.S.C. § 402(g)(1)(D),[4] and (j)(1),[5] and 20 C.F.R. § 404.601.[6] He also held that the oral

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tion for any month after August 1950 had he filed application therefor prior to the end of such month shall be entitled to such benefit for such month if he files application therefor prior to the end of the twelfth month immediately succeeeding such month.

[4] *See* note 1 *supra.*

[5] *See* note 3 *supra.*

[6] 20 C.F.R. § 404.601 provides:

(a) *Claimant defined.* The term "claimant" for purposes of this subpart refers to the individual who has filed on his own behalf, or on whose behalf a proper party under § 404.603 has filed, an application for monthly benefits, a lump-sum death payment, the establishment of a period of disability, entitlement to hospital insurance benefits, or special age 72 payments.

(b) *Applicant defined.* The term "applicant" for purposes of this subpart refers to the individual who has

contact made by the claimant on June 12, 1974 could not be considered to satisfy the requirements for filing a written application, either as a matter of law or on the basis of equitable estoppel. He was upheld by the Appeals Council.

The district court reversed, concluding that appellee asked to complete an application but was denied that opportunity. In this case, the court held, the regulation requiring application in writing was "unreasonably restrictive," especially since the Social Security Claims Manual explicitly directed SSA em-

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filed an application on his own behalf or on behalf of another for monthly benefits, a lump-sum death payment, the establishment of a period of disability, special age 72 payments, entitlement to hospital insurance benefits.

(c) *Application defined.* Unless otherwise specified, the term "application" refers only to an application on a form prescribed in § 404.602 and includes an application for monthly benefits, a lump-sum death payment, the establishment of a period of disability, special age 72 payments, and entitlement to hospital insurance benefits.

(d) *Filing of application on prescribed form.* Except as provided in §§ 404.611, 404.613, and 404.614, an individual has not "filed an application" for purposes of sections 202, 216(i), 223, 226, or 228 of the Act until an application on a form prescribed in § 404.602 has been filed in accordance with the provisions of this Subpart G.

(e) *Execution of application, written statement, requests, or notice; defined.* The term "to execute an application" (or a written statement, request, or notice (see §§ 404.610 and 404.613)), means the completion and signing of the application (or written statement, request, or notice). Irrespective of who may have completed the items on the application (or written statement, request, or notice), the document is considered to have been executed by or on behalf of such claimant when it is signed by the claimant (or an individual authorized to do so on his behalf under § 404.603).

ployees to inform applicants of the advantage of filing an application and to suggest filing even in cases of doubtful eligibility. In so holding the court referred to *Tuck* v. *Finch*, 430 F.2d 1075, 1077 (4th Cir. 1970), *Leimbach* v. *Califano*, 450 F.Supp. 245, 246, (E.D.Mo. 1978), and *Holmes* v. *Weinberger*, 423 F.Supp. 149, 152-54 (E.D.N.Y. 1976).

Section 202(g) of the Social Security Act, 42 U.S.C. § 402(g), *see* note 1 *supra*, provides the conditions of entitlement for mother's insurance benefits. It requires in subsection (1)(D) that the claimant be someone who "has filed application." *See also* § 202(a)-(h), 42 U.S.C. § 402(a)-(h) (containing the same language). The filing of some sort of application is accordingly a condition precedent to entitlement to benefits under this section. *E.g. Clark* v. *Celebrezze*, 344 F.2d 479, 481 (1st Cir. 1965).

Until 1955, Social Security regulations allowed for oral applications. *See Holmes* v. *Weinberger*, *supra*, 423 F.Supp. at 153; *Johnson* v. *Hobby*, 131 F.Supp. 497, 499 (D.R.I. 1955). Since 1955, however, the regulations implementing the "has filed application" requirement have specifically provided for applications in written form. 20 C.F.R. § 404.601(c). The regulation requiring a written application is valid on its face, particularly in light of the fact that the statute allows for delays in applying by making benefits retroactive for a year prior to the filing of the application. 42 U.S.C. § 402(j).[7] The purpose of this regulation is stated in *Goff* v. *Weinberger*, No. H 74-276 (D.Conn., Oct. 17, 1975), *aff'd mem.*, 538 F.2d 309 (2d Cir.), *cert. denied*, 429 U.S. 896, 97 S.Ct. 258, 50 L.Ed.2d 179 (1976):

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[7] *See* note 3 *supra*.

> The Social Security Act, supplemented by its regulations, was intended to eliminate or at least reduce to a minimum the possibility of fraud, confusion and laxity in its administration. The vastness of the program makes it essential to adhere to the written application procedure, if there is to be an orderly and controllable system of management for approving claims and paying out insurance benefits.

See also Leimbach v. *Califano*, 596 F.2d 300, 304 (8th Cir. 1979), reversing the most recent of the decisions relied upon by the district court below, *Leimbach* v. *Califano*, 450 F.Supp. 245 (E.D.Mo. 1978). Thus there is no doubt that the regulation requiring a written application is valid as " 'reasonably related to the purposes of the enabling legislation.' " *Mourning* v. *Family Publications Service*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1661, 36 L.Ed.2d 318 (1973) (citing cases).

Here the court below, like the court in *Holmes* v. *Weinberger*, *supra*, disregarded the regulation in a particular case. *See also Tuck* v. *Finch*, *supra*. Courts are not, however, empowered to disregard valid implementing regulations in particular cases whenever their application appears to be somewhat unfair or particularly onerous. This ground of decision is therefore not available to us. *See Leimbach* v. *Califano*, *supra*, 596 F.2d at 304.

But this does not end the matter. The Government may sometimes be estopped from enforcing its rules, based on the conduct of its agents. Here, the ALJ specifically concluded that "[t]he evidence indicates that Mr. Connelly did not refuse to give the claimant an application form or refuse to allow her to file an application," and this finding is supported by substantial evidence. *See Franklin* v. *Secretary of HEW*,

393 F.2d 640, 642 (2d Cir. 1968). But the ALJ's narrative also includes the following: "[T]he interviewer did not ask her if she wanted to file an application. When she asked him if she should, he responded by advising her she was not eligible." This finding surely is supported by the claimant's testimony, set out above. This may not amount to a "refusal" to accept a written application, but it surely is conduct by the claims official deterring the filing of a written application. The question thus becomes whether the Government is estopped in this specific situation, which falls short of intentional deception but does constitute affirmative misinformation.

It may well be, as the Government argues and the Appeals Council found, that this misinformation resulted from appellee's failure to tell Connelly that her former husband was dead, since this fact was a prerequisite of her eligibility. It could also be that, as the amendment affording benefits to appellee was relatively new, Connelly was unfamiliar with it.

Regardless of these possibilities, internal department procedures indicate that the Field Agent's actions were improper. Presumably to take into account the possibility of a failure of communication between the prospective applicant and the representative, the Claims Manual guiding such matters indicates that the individual "should be fully informed of the application requirements and the advantages of filing," and that it will be appropriate to suggest to the individual that he file an application, resolving "any doubtful situation in favor of suggesting that the individual file." Social Security Claims Manual ¶ 2003. More importantly it *specifically* advises the claims official in no uncertain terms: "*Do* not deter an individual from filing solely on the basis that he is not eligible . . . . This is true even where he is

clearly ineligible." These things Connelly did not do. It is true that the Claims Manual does not have by its own terms "the force or effect of law." It is not a regulation. It was not published as such in the *Federal Register*. But these facts are not conclusive in this case.

Until recently, it was a rubric that the Government cannot be estopped. *E.g., Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947). Professor Davis points out, however, that the law has changed and "the doctrine of equitable estoppel does apply to the government" as a result of the "almost uniform support of decisions of the 1970s." K. Davis, *Administrative Law of the Seventies*, § 17.01, at 399 (1976). The question has usually arisen in context where the claimant was substantively ineligible for the claimed benefit. *Merrill* itself involved substantive ineligibility for crop insurance based on a regulation making such insurance unavailable for reseeded winter wheat. 332 U.S. at 385, 68 S.Ct. at 3. This court's decision in *Goldberg* v. *Weinberger*, 546 F.2d 477 (2d Cir. 1976), *cert. denied*, 431 U.S. 937, 97 S.Ct. 2648, 53 L.Ed.2d 255 (1977), involved the unavailability of disability benefits to a disabled widow who had disqualified herself by remarrying before age 60. And in *Corniel-Rodriquez* v. *INS*, 532 F.2d 301 (2d Cir. 1976), a woman had been denied her immigrant visa because she married. In such cases, a distinction is often drawn between a mere failure to provide accurate information, which will not give rise to estoppel, and "affirmative misconduct" by a Government official, which may do so. *See id.* at 307; K. Davis, *supra*, §§ 17.03 and 17.04 (Supp. 1978). This distinction was given slight support by the Supreme Court in

INS v. *Hibi*, 414 U.S. 5, 8, 94 S.Ct. 19, 21-22, 38 L.Ed.2d 7 (1973) (per curiam) ("While the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship was left open in *Montana* v. *Kennedy*, 366 U.S. 308, 314, 315 [, 81 S.Ct. 1336, 1340, 1341, 6 L.Ed.2d 313] (1961), no conduct of the sort there adverted to was involved here.").

Here, as our previous discussion indicates, there was no finding of "affirmative misconduct," if that term is defined to mean intentional violation of a rule having the force of law. But here we are talking about a procedural requirement: the necessity of filing a written as opposed to an oral application. Appellee was at all times "substantively" eligible in the sense that she was in the class of people that Congress intended to benefit. It would fulfill the fundamental legislative goal to grant appellee the benefits she seeks. It is no answer to say that a written application is a condition precedent to entitlement, as the Eighth Circuit did in *Leimbach* v. *Califano*, *supra*, 596 F.2d at 302; we assume, as we have said, that that is the case, but the question we are discussing is whether the Government should be estopped here from insisting upon compliance with this essentially procedural requirement as to the claim for retroactive benefits. *Leimbach* itself did not decide the estoppel issue on that ground: it simply decided that there had to be "affirmative misconduct" and, in a case with facts quite close to the present ones, found no such misconduct. No argument was made along the lines we here suggest—that there is a distinction between substantive ineligibility, on the one hand, and the fulfillment of a procedural requirement by a person who is substantively eligible on the other. In our

view, at least in the latter case, misinformation provided by a Government official combined with a showing of misconduct (even if it does not rise to the level of a violation of a legally binding rule) should be sufficient to require estoppel. We conclude that, here, the Field Representative's statements and conduct were sufficient to create an estoppel as to procedural requirements. Misinformation was clearly given to appellee. As for misconduct, the Claims Manual has relevance since it does indicate what is proper conduct of local office personnel. Moreover, the local officer's own record of events, as in *Tuck* v. *Finch*, *supra*, 430 F.2d at 1077, tends to support the proposition that he was acting hastily and contrary to the Manual. He was proceeding on the assumption, according to his own notation, that this was a "post adjudication matter." Surely the uninformed would-be applicant cannot have been talking along the lines of a "post-adjudication matter" because she had had so far as appears no previous contact with the agency.

Appellant argues that the reliance of appellee on Connelly's statement that she was ineligible has to be "justifiable," citing *Brown* v. *Richardson*, 395 F.Supp. 185, 191 (W.D. Pa. 1975). The argument is that appellee did not justifiably rely because she "had been told by an attorney that he believed that she was eligible," Gov't Brief at 19, and instead chose to rely on her understanding of the representations of a Social Security Field Representative. Appellant also points out the fact that the claimant did nothing between June of 1974 and May of 1975 and specifically did not consult with the same attorney. But the appellee believed the Field Agent, and her lawyer had only told her that 'he thought that probably I was illegible (sic)" and that "if he was me he would go up to the office and apply." This sounds to us like

very informal advice—the kind of small-town country-lawyer advice that was written about so well in the Arthur Train stories. It involved no formal written opinion, probably little or no fee, very little research and a certain unfamiliarity with the law as indicated by the "probably" and the conditional suggestion "if he was me." Having received the word "straight from the horse's mouth," that is, from the Social Security Field Representative who at the local level represents the whole force and authority of the United States Government, the applicant cannot be faulted for continuing to think that she was ineligible or for not going back to her attorney. It was only by chance that she discovered her eligibility when she received a booklet in the mail and then called the Social Security "Enterprise" number and received confirmation.

Accordingly, we hold that appellee did justifiably rely on the Government's conduct, which we have held was unjustifiable. We emphasize that our holding of estoppel under these circumstances is limited to the situation where (a) a procedural not a substantive requirement is involved and (b) an internal procedural manual or guide or some other source of objective standards of conduct exists and supports an inference of misconduct by a Government employee.

Affirmed.

FRIENDLY, Circuit Judge, dissenting:

By dispensing with compliance with an admittedly valid regulation, 20 C.F.R. § 404.601(d), which requires a written application on the appropriate form for a wide variety of social security benefits, the majority opens the door of the federal fisc not simply to

Mrs. Hansen, whom we at least know to have visited the HEW office and said something, but to thousands who merely will make a detailed claim that they have done so and whom there is no effective means of rebutting. Millions of dollars will have to be expended simply to ascertain whether conditions of eligibility claimed in a subsequent written application existed at the time of the alleged oral one.[1] And all this because a minor HEW official has not followed a housekeeping rule that he suggest the filing of an application even though he considers the claim to be without merit, as may well have been true in this case on the facts before him.

A controlling decision of the Supreme Court has established for more than three decades that all courts must "observe the conditions defined by Congress for charging the public treasury." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 385, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947). The claimants *in Merrill* had a *far* more appealing case than Mrs. Hansen's desire to have the benefits that will be paid her in any event start from a year before her oral application rather than a year before her written one as the regulation provides. A committee acting as agent for the Federal Crop Insurance Corporation affirmatively advised the Merrills that the whole of their proposed crop of spring wheat would be insurable, whether planted on reseeded winter wheat acreage or not. So it could have been under the govern-

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[1] Judge Newman's concession, fn. 10, that where expensive investigation would be required, "the appropriateness of an estoppel might be tenuous, indeed" points to another defect of the majority opinions—namely, that they fail to furnish a workable rule that can be readily understood and economically employed.

ing statute, but valid regulations issued by the Corporation provided no protection for spring wheat planted on reseeded winter wheat acreage. The bulk of the Merrills' crop was so planted and perished. Insurance benefits were held to have been properly denied. Unlike the Merrills who committed themselves irretrievably to costly mistaken action on the basis of clearly erroneous advice, the most that can be said here is that, through what could have been entirely proper advice on the facts communicated to the field agent, Mrs. Hansen left the Social Security Office without having filed the written application essential to start the running of a retroactive year's benefit period—action she was free to alter the next day.

In the thirty two years since *Merrill* no Supreme Court decision has gone counter to what that case has held. While some courts and commentators have sought to find a contrary indication in *Moser* v. *United States*, 341 U.S. 41, 47, 71 S.Ct. 553, 556, 95 L.Ed. 729 (1951), this is an instance of the wish being father to the thought. The four survivors of the *Merrill* majority joined in *Moser;* decision was placed on the ground that a claim to citizenship could be relinquished only be intelligent waiver, which Moser had not done; *Merrill* was not cited; and the opinion expressly said, "There is no need to evaluate these circumstances on the basis of any estoppel of the Government or the power of the Swiss Legation to bind the United States by its advice to petitioner."

Montana v. *Kennedy*, 366 U.S. 308, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961), refused, under the most poignant circumstances, to prevent the Government from asserting that Montana's birth had occurred outside rather than within the United States solely because of the misconduct of a federal official. Montana had been born in Italy of an Italian father and American

mother, left Italy that same year with his mother for the United States, and had resided continuously in the United States for 55 years. The Court interpreted then applicable citizenship laws to the effect that Montana was not an American citizen because of his foreign birth. Montana argued that the United States should not be permitted to rely on the fact of his foreign birth because his mother, when pregnant with him, had tried to leave Italy for the United States, but was denied a passport by an American Consular Officer because of her pregnant condition, although in fact neither the United States nor Italy required a passport for United States citizens to return to America. Conceding the serious error, Justice Harlan nonetheless held that this action by a Government official "falls far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth," and added that "In this situation, we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials." *Id.* at 314-15, 81 S.Ct. at 1341. If the giving of such misinformation to Mrs. Montana, resulting in her failing to exercise a right to return to her native land, with the consequence that her son who subsequently resided here for 55 years was denied American citizenship, fell "far short" of what was needed even to trigger inquiry, what are we to say of a situation where the head and front of the offending was an official's failure to press an application into Mrs. Hansen's hand?

The last of the series of Supreme Court decisions is *INS* v. *Hibi*, 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973) (per curiam). This involved a Filipino who applied for United States citizenship pursuant to the Nationality Act of 1940, which provided for natural-

ization of non-citizens who, like Hibi, served honorably in the United States Armed Forces during World War II. Although Hibi applied 17 years after the expiration of the time limit established by Congress under the Act, he argued that the Government was estopped from relying on the limit because of its "failure to advise him, during the time he was eligible, of his right to apply for naturalization," and its failure to post naturalization officials in the Philippines. *Id.* at 7-8, 94 S.Ct. at 21-22. The Court declined to apply estoppel:

> While the issue of whether "affirmative misconduct" on the part of the Government might estop it from denying citizenship was left open in *Montana* v. *Kennedy*, 366 U.S. 308, 314, 315 [, 81 S.Ct. 1336, 1340, 1341, 6 L.Ed.2d 313] (1961), no conduct of the sort there adverted to was involved here. We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government. *Id.* at 8-9, 94 S.Ct. at 21-22.

The sole Second Circuit authority giving any shade of comfort to the plaintiff is *Corniel-Rodriquez* v. *INS*, 532 F.2d 301 (2 Cir. 1976).[2] This involved a

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[2] Judge Newman's citation of *Miller* v. *United States*, 500 F.2d 1007 (2 Cir. 1974), is unavailing. That case recognized the rule that "the government is not estopped by an *unauthorized* act of one of its agents," *id.* at 1010 (emphasis in original), and ruled against the Government because it considered the Government agent's action, although erroneous, to have been authorized. Further, the case presented a conflict be-

"young and naive" alien who sought admission to the United States as a "special immigrant". Special immigrants are not subject to the general immigration quotas, and include immigrants from the western hemisphere holding a previously obtained work permit from the Secretary of Labor. Children of individuals who, like plaintiff's father, had already obtained special immigrant visas were not required to have a work permit. By statute, however, they must not be married either at time of application for a visa *or* admission to the United States. A State Department regulation required immigration officials to warn individuals in plaintiff's category that they would be inadmissible if "not unmarried at the time of application for admission." A procedural note implementing the regulation provided that marriageable age applicants were to be given a written warning form informing them that they would become ineligible if they married prior to entry. Plaintiff received a special immigrant visa as an unmarried child of an individual who had been admitted as a

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tween what the court considered to be two equally valid statutory provisions—the question was simply which one to apply. Here there is no competing statute or regulation permitting Mrs. Hansen to file orally. Finally, *Miller* focused on the "flexible approach" it discerned in 26 U.S.C. § 6532 which, *inter alia*, allows the Government and the taxpayer to extend the limitations period by agreement. See *DeGregory* v. *United States*, 395 F.Supp. 171, 175 (E.D. Mich. 1975). Here, Congress has specifically limited its flexibility for those who fail to file appropriately to an award of up to one year retroactive benefits, which Hansen has received, see *infra*. The other Second Circuit case cited, *Podea* v. *Acheson*, 179 F.2d 306 (1950), made no mention of estoppel and, contrary to the implication of footnote 3 of the concurring opinion, the Supreme Court did not approve of *Podea* in *Montana* but rather specifically declined to inquire into its correctness.

special immigrant, but married after receiving his visa and before entry into the United States. The State Department thereupon sought her deportation. Plaintiff and her mother, who had accompanied her when she received her visa, both testified that they were given no warning, either oral or written, as to the consequences of such a marriage. No warning form appeared in plaintiff's INS file, nor was one attached to her visa. The Immigration Judge disbelieved plaintiff's testimony, finding it insufficient to rebut the presumption of administrative regularity. The Board of Appeals held that regardless of what happened at the consulate office, the Government could deport petitioner for failure to comply with the statutory terms of admission.

Assuming that the consular official had not adhered to the mandatory regulations, Chief Judge Kaufman felt this constituted sufficient "affirmative misconduct" under the *Hibi* dictum. He specifically noted that the regulations requiring warnings "carried[d] the force of law [and] must be respected and enforced by the Government," *id.* at 307, and distinguished *Hibi* as not involving any such violation of a regulation with the force of law, *id.* at 307 n. 17. In this respect, as will be seen, our case is like *Hibi* and unlike *Corniel.* In a footnote, the court further carefully restricted its ruling:

> We do not, of course, suggest that non-compliance with any regulation, no matter how minor its impact or importance, will automatically prevent the Government from deporting an illegal alien. Our holding is limited to the extraordinary circumstances before us. *Id.* at 307 n. 18.

The limited nature of the *Corniel* exception was speedily underscored in *Goldberg* v. *Weinberger*, 546

F.2d 477 (2 Cir. 1976), *cert. denied*, 431 U.S. 937, 97 S.Ct. 2648, 53 L.Ed.2d 255 (1977), which reiterated this circuit's adherence to the *Merrill-Montana-Hibi* rule. Plaintiff was receiving widow's benefits from the SSA, and was told by the SSA that her marriage prior to the age of 60 would reduce but not terminate her benefits. In fact, the relevant statute provided that such remarriage would totally eliminate any widow's benefits, while marriage after age 60 would only effect a reduction in benefits. Plaintiff remarried some two months prior to her sixtieth birthday and all her benefits were cut off. This court rejected her effort to invoke estoppel against the Government:

> The government could scarcely function if it were bound by its employees' unauthorized representations. Where a party claims entitlement to benefits under federal statutes and lawfully promulgated regulations, that party must satisfy the requirements imposed by Congress. Even detrimental reliance on misinformation obtained from a seemingly authorized government agent will not excuse a failure to qualify for the benefits under the relevant statutes and regulations. *Id.* at 481.

Judge Hays noted that the Ninth Circuit had "evinced a willingness to depart from the principle in certain circumstances," but declined to embark this circuit on that course. *Corniel* was distinguished and limited:

> Our decision in *Corniel-Rodriquez* v. *I.N.S.* . . . is not to the contrary. We held there that estoppel may be invoked against the government where there is "noncompliance with an affirma-

> tively required procedure . . . ." 532 F.2d at 306-07. We took pains, however, to limit our decision to the specific facts of that case, particularly the fact that the government employee had failed to provide petitioner with a warning *mandated* by federal regulations. *Id.* and n. 18. No such regulation governs Social Security office employees. 546 F.2d at 481 n. 5 (emphasis in original).

Beyond this array of relevant Supreme Court and Second Circuit cases, two very recent decisions of the Eighth and Seventh Circuits are almost precisely in point. *Leimbach* v. *Califano*, 596 F.2d 300 (8 Cir. 1979), reversed a district court decision relied on by Judge Coffrin below. When Leimbach inquired at a SSA office concerning his children's eligibility for benefits due to his wife's decease, he was erroneously informed that the children were not eligible. Additional oral inquiries over the next five years received the same erroneous response. Leimbach discoverd some seven years after his first inquiry that the children were in fact eligible. He applied in writing on the appropriate form for his children who then received benefits retroactive for one year. The Eighth Circuit reversed a district court decision granting the Leimbach children benefits as if they had applied during Leimbach's first visit to the SSA office. Citing the *Merrill* rule, the court said that "courts have uniformly held that estoppel will not lie against the Agency where an applicant has simply received misinformation on which he relied to his detriment." *Id.* at 304. Noting that the *Hibi* Court had left open the question whether affirmative misconduct by a government official might give rise to an estoppel against the government, and accepting Leimbach's testimony

that the agency representative had discouraged his filing an application, the court nonetheless stated that it found "nothing that would amount to affirmative misconduct" and "that at worst Mr. Leimbach was simply misinformed by Social Security employees concerning his children's eligibility. Such action on the part of Agency employees, although regrettable, will not give rise to an estoppel against the government." *Id.* at 305. Despite his general dislike of the principle of no estoppel against the Government, see Administrative Law of the Seventies, § 17.01 at 400 (1976), Professor Kenneth Culp Davis has written very recently of *Leimbach*, "A private party loses by lack of timely filing even though government employees misled him into believing that the filing was not required. The authorities the court cites support the decision, which is important because the pattern so often recurs." 1980 Supplement to Administrative Law Treatise, 109 (1980).

Moreover, since the instant case was argued, the Seventh Circuit has followed *Leimbach* in *Cheers* v. *Secretary of H.E.W.*, 610 F.2d 463 (7th Cir. 1979). Claimant sustained a severe injury which caused him to become a paraplegic. Since February 1968 he was eligible for disabled children's benefits, but he did not file a written application until April 1976, at which point he was given benefits retroactive for one year. Claimant testified that he and others acting on his behalf had repeatedly inquired orally as to his eligibility for benefits between 1968 and 1975, but that he was consistently and incorrectly told that he was ineligible.[3] The Government, claimant argued, should

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[3] While the Seventh Circuit noted that there was little factual support for the contention that claimant even communicated with Social Security employees or relied upon mis-

therefore be estopped to deny benefits because of his failure to file a written application. Acknowledging sympathy with the claimant's plight, the court, speaking through Judge Pell, nonetheless declined to override "the well established principle that estoppel shall not operate against the Government in these circumstances." at 469. See also *Gressley* v. *Califano*, 609 F.2d 1265, 7th Cir. (1979).

It should be noted that the Social Security officers involved in *Leimbach* and *Cheers* were subject to the same provisions in the Claims Manual on which Judge Oakes so heavily relies. Furthermore, in both cases this provision was violated not once, as here, but several times over many years. Finally, whatever one is to make of the majority's substance/procedure distinction, see *infra*, the sole basis for denying benefits in *Leimbach* and *Cheers* was the same failure to file a written application present in this case.

Even the Ninth Circuit, whose occasional departures from *Merrill* this court has expressly declined to follow, *Goldberg* v. *Weinberger*, *supra*, 546 F.2d at 481, see also *N.Y. Athletic Supply Co., Inc.* v. *United States*, 450 F.Supp. 469, 471 (S.D.N.Y. 1978)

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information furnished by them, in its estoppel discussion the court assumed *arguendo* that claimant's testimony was accurate, at 468-69; see also *id.* at 468 n.6. The inability to either credit or rebut a claimant's testimony with any degree of certainty is a common phenomenon in oral application cases, including the present one. See, e.g., *Leimbach* v. *Califano*, *supra*, 596 F.2d at 302, n.2. Knowing that the claimant actually visited the SSA office, as we do here, is of little help in reconstructing the content of the interview. As the *Cheers* court noted, it is precisely such difficulties which "underi[y] and justify the need for regulations that require written applications," at 467—and should discourage the use of estoppel to evade them.

(Frankel, J), has recognized limits on the application of estoppel against the Government in cases like this which the majority ignores. In *Santiago* v. *INS*, 526 F.2d 488 (9 Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976), the court declined to apply estoppel against the Government because "the central complaint of each petitioner is . . . the failure to inform or inquire," *id.* at 493, and such failure to inform did not constitute "affirmative misconduct" as required by the *Hibi* dictum. See also *Oki* v. *INS*, 598 F.2d 1160 (9 Cir. 1979) (per curiam). Here Mrs. Hansen's complaint also focuses on Connelly's failure to inquire more deeply into her eligibility and to inform her that she should file a written application. *United States* v. *Ruby*, 588 F.2d 697 (9 Cir. 1978), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2838, 61 L.Ed.2d 284 (1979), indicates that the Ninth Circuit's "affirmative misconduct" limit is two-pronged. The court there declined to estop the Government because the conduct complained of, although affirmative, could not properly be characterized as misconduct. As will be discussed below, it is similarly not clear here that what Agent Connelly affirmatively did, namely to tell Mrs. Hansen that she was ineligible, was "misconduct" of any sort. Even more closely on point is *Simon* v *Califano*, 593 F.2d 121 (9 Cir. 1979). An HEW trainee was filling out a benefits application for a claimant. Without asking the claimant if she had any children, the trainee wrote "None" in the answer to the question "How many children do you have who may be eligible for benefits?" The claimant signed the application without reading it. In fact she had two children who were eligible for benefits. When she discovered their eligibility two years later, she sought benefits calculated from the date of her previous application,

arguing that the Government should be estopped from denying that the children had also applied at that time. The court declined to estop the Government, for two reasons, both applicable to the case before us. First, "the trainee was guilty of negligence, but that negligence does not amount to affirmative misconduct." *Id.* at 123. Second, Mrs. Simon's children were awarded benefits retroactive for one year from their filing, as Mrs. Hansen's have, and the court did not believe that the loss of retroactive benefits for another year "is of such magnitude and is so serious that HEW should be estopped from enforcing the express terms of the Act." *Id.*

These decisions have been set forth at some length so that it may be appreciated how far today's decision departs from a solid and well-articulated body of doctrine that funds contributed by all citizens, with definite limitations upon their use, are not to be diverted to a person not within these limitations simply because the Federal Government has not been able to secure perfect performance from its hundreds of thousands of employees scattered throughout the continent. To be sure, the Supreme Court has left open whether a case might arise in which misconduct by a Government official was so egregious as to justify a departure from *Merrill* and we found such a case in *Corniel-Rodriquez.* But the applicability of the *Merrill* principle to run of the mill cases like this has become so well established that *stare decisis* requires a court to adhere to it, however strongly a judge may dislike the result.[4] In fact, it would be

[4] *Tuck* v. *Finch,* 430 F.2d 1075 (4 Cir. 1970), is not a true departure from this line of authority, even if it were correctly decided. Tuck orally inquired about his eligibility for disability benefits and was informed, correctly, that he was

hard to find a spongier factual launching pad for the majority's takeoff than this.

To begin, we know little of what really happened. Mrs. Hansen's interview with Connelly took place in the spring of 1974. When she testified three years later, she had no accurate memory of the date until Connelly's records revealed it. On her own account of the episode she had revealed to Connelly no details of her marital history save for a claim of divorce from

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ineligible as he had not worked the requisite amount of time prior to disability. Tuck, however, could adjust his self-employment income in tax returns in order to qualify himself, if he did this within three years, three months and fifteen days from the relevant year of self-employment; if Tuck applied during this period, but adjusted his income later, the SSA could change their records accordingly. Tuck's visit to the SSA office was within the period but he did not apply in writing until after it had expired. The court held that the unwritten informal application satisfied the statute and allowed Tuck to qualify himself for disability benefits. One ground for decision was that Tuck was illiterate. The court pointed out that "[w]hile a written application might be expected from a literate person, an illiterate often can do little other than make an oral request to the official to whom he has been referred." *Id.* at 1077. Beyond this the *Tuck* court seemed confused about the Secretary's regulations. It stated for some unarticulated reason that "[u]se of a form . . . does not appear to be mandatory," and did not cite to 20 C.F.R. § 404.601(d) which clearly made it so. Because of this the case is neither one of "estoppel" or even of misconduct, and the court never used these words or cited any of the relevant cases applying them. The conclusion that *Tuck* is not an estoppel case is fortified by *Montgomery County* v. *Ball*, 416 F.Supp. 737, 742-44 (D.Md. 1975), vacated on other grounds, 561 F.2d 1120 (4 Cir. 1977), *cert. denied*, 435 U.S. 994, 98 S.Ct. 1644, 56 L.Ed.2d 83 (1978). Although bound by *Tuck*, the district court, citing *Merrill*, flatly stated that "[a] government agency cannot be held responsible for the erroneous statements and representations made by its agents."

someone and a reference to "two Riegel boys".[5] Connelly, of course, could remember nothing with respect to this particular interview out of thousands he had conducted; this is one of the strong reasons for requiring applications to be in writing. I do not read the ALJ's decision as accepting the claimant's credibility beyond the facts, found by him, that she went to the office with the purpose of filing a written application under the then recently enacted amendment relating to divorced mother's insurance benefits, that she was told she was ineligible, and that she left without having filed a written application. The colorful details are the claimant's, after three years of brooding, and hers alone.[6]

It is undisputed that, under 42 U.S.C. § 402(g)-(1), Mrs. Hansen was not entitled to benefits on account of the "two Riegal boys" unless Riegel was dead. She does not claim to have told Connelly anything to that effect, it is not even wholly clear that she then knew it, and Connelly had no reason to conjecture

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[5] The claim as ultimately filed in 1975 showed she had married Wallace Riegel, Jr. on August 14, 1954 and divorced him on May 18, 1960, and that she had married James Hansen on November 25, 1961 and divorced him on April 16, 1964. The birth certificates of the Riegel boys show they were born on July 4, 1956 and April 29, 1958. The blanks on the application relating to the date, place and nature of Riegel's death were marked "N.A." and the question "[i]s there a surviving parent (or parents)?" was answered with a check in the "No" box. In fact Riegel had died on February 8, 1967 and was buried by his mother.

[6] Mrs. Hansen's mother's brief testimony supported only the assertions that Mrs. Hansen went in to apply for benefits and emerged upset because of Connelly's question concerning her marital status.

that a man who then would have been only 43 was dead. Connelly's advice as to Mrs. Hansen's ineligibility was thus not wrong on the basis of what he was proved to have known. This would not suffice to create an estoppel even against a private company. See, e.g., *Gladden* v. *Pargas, Inc.*, 575 F.2d 1091, 1094 (4 Cir. 1978) ("Estopped parties' knowledge, either actual or implied, that the representations were untrue when made" is an essential element of estoppel); *Kenneally* v. *First National Bank of Anoka*, 400 F.2d 838, 843 (8 Cir. 1968), *cert. denied*, 393 U.S. 1063, 89 S.Ct. 716, 21 L.Ed.2d 706 (1969) (same); *Special Event Entertainment* v. *Rockefeller Center, Inc.*, 458 F.Supp. 72, 76 (S.D.N.Y. 1978) (same). The majority's frequent talk of Connelly's furnishing "misinformation" is thus wholly misplaced. Nothing in the ALJ's findings suggests misconduct on the part of Connelly and the Reconsideration Branch stated that "it is highly improbable that [Connelly] would have informed Mrs. Hanson [sic] that she was not eligible for benefits on the account of Wallace Riegel if she did in fact meet all the requirements for entitlement to benefits."

Judge Oakes, but not Judge Newman, seeks to find misconduct of the sort he considers sufficient for an application of estoppel against the Government by reference to the provisions of the Claims Manual advising agents to recommend the filing of written applications. This ignores that the Claims Manual was not a regulation having the force of law such as the regulations in *Corniel, supra*, 532 F.2d at 307, but was simply an internal agency handbook, never made the subject of proceedings under 5 U.S.C. § 553 as a regulation would have had to be, and expressly stat-

ing that it had no legal effect.[7] Clearly it is in the public interest for an agency with over 80,000 employees, making more than 1,250,000 disability determinations alone a year, with 215,300 reconsiderations, see 1 Davis, Administrative Law Treatise § 1.3 (2d ed. 1978), to issue housekeeping instructions to its employees in the interest of uniform, fair and efficient administration. But it is perplexing why an agency that issues such instructions should be held to a higher legal standard of dealing with its clients than one that does not. This is all the more so in view of the fact that within the last year the Supreme Court has so strongly emphasized this very point. *United States* v. *Caceres*, 440 U.S. 741, 755-56, 99 S.Ct. 1465, 1473-74, 59 L.Ed.2d 733 (1979).[8] Dealing

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[7] "The CM is a compilation of instructions for the use of SSA personnel in claims cases. However, it does not have the force or effect of law, and understanding its instructions presupposes a familiarity with the Act and the regulations."

[8] *Caceres* was not new doctrine. See *Sullivan* v. *United States*, 348 U.S. 170, 172-74, 75 S.Ct. 182, 184, 99 L.Ed. 210 (1954) (Executive Order and Circular Letters from Department of Justice requiring approval of Department before presentation of evidence to grand jury "simply a housekeeping provision of the Department" whose violation had no legal effect) ; *American Farm Lines* v. *Black Ball Freight Services*, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970) (I.C.C. rule specifying contents of application for temporary operating authority under § 210a of the Interstate Commerce Act does not preclude grant of authority to non-complying applicant) ; *United States* v. *Lockyer*, 448 F.2d 417, 420-21 (10 Cir. 1971) (defendant taxpayer cannot take advantage of provision in Internal Revenue Audit Technique Handbook and Internal Revenue Manual instructing when revenue agent must suspend investigation on finding an indication of fraud).

with a failure of the IRS, before undertaking consensual electronic surveillance, to implement safeguards provided in an Internal Revenue Service Manual, beyond those constitutionally or statutorily demanded, the Court said:

> we cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures. . . [S]ince the content, and indeed the existence, of the regulations would remain within the Executive's sole authority, the result might well be fewer and less protective regulations. In the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration . . . than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form.[9]

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[9] While the factual circumstances of *Caceres* differ from those of the present case, these differences are not significant so far as the relevance of the quoted language is concerned. *Caceres* involved a criminal prosecution, but Justice Stevens noted that even in agency adjudications "it seems clear that agencies are not required, at the risk of invalidation of their action, to follow all of their rules, even those properly classified as 'internal'." 440 U.S. at 754 n.18, 99 S.Ct. at 1473 n.18. The *Caceres* opinion also noted that the taxpayer had not relied on the IRS Manual provision and that its violation had not affected his conduct. *Id.* at 753, 99 S.Ct. at 1472. This discussion was in the course of determining whether the Due Process clause was violated, however, and no one suggests that Hansen has a constitutional claim. Furthermore, the SSA went to considerable lengths to ensure that the Claims Manual not be considered to create any rights that did not

Similar considerations apply to imposition of civil liability. Here it is far better to have thousands of field agents behaving as the Field Manual instructed them than to put the Government at risk that every alleged failure by an agent to follow instructions to the last detail in one of a thousand cases will deprive it of the benefit of the written application requirement which experience has taught to be essential to the honest and effective administration of the Social Security Laws.[10]

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otherwise exist. Not only did the Manual explicitly state that it did not have the force or effect of law, note 7, *supra*, but it also provided that it was never to be cited in any correspondence with the public. Indeed, although open to the public under the Administrative Procedure Act, 5 U.S.C. § 552(a)(2)(C), the Manual provided that it was not to be offered to the public "unless the inquirer specifically wishes to see the CM."

[10] It is worth noting how small Connelly's violation of the relevant passage of the Claims Manual actually was. This reads:

> 2003. Administrative Policy of Acceptance of Application.
>
> a) General
>
> Where an individual is inquiring about possible current entitlement to [Retirement, Survivors (including Mothers') Disability, Health Insurance] benefits, his interests will ordinarily be best served by filing an application immediately so that retroactive title II benefits will be better protected and a determination made on his entitlement. He will also have the right of appeal in the event he is not satisfied with the determination. The individual must make the actual decision of whether or not to file, but he should be fully informed of the application requirements and the advantages of filing. Unless filing is obviously disadvantageous or the question is one of filing for reduced title II benefits only, it will be appropriate to suggest to the individual that he files an applica-

We are told there is a significant distinction between substance and procedure, which apparently has been lost on other courts, since in the latter case Congress really wants the claimant to have the benefit, so that estoppel will advance the substantive purpose whereas refusal to estop will frustrate it. We are thus to ignore the directive of *Merrill* that courts must "observe the conditions defined by Congress for charging the public treasury," 332 U.S. at 385, 68 S.Ct. at 3, because "[t]he only people who will gain from this decision are those who are substantively qualified: those whom Congress intended to receive the benefit." The hollowness of the substance/proce-

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tion. Resolve any doubtful situation in favor of suggesting that the individual file since he may withdraw his application later if he wishes.

A delay in filing should never be suggested because there is no doubt as to the inquirer's eligibility or because extensive development may be necessary. An application should be obtained and development made for a determination. Do not deter an individual from filing solely on the basis that he is not eligible . . . This is true even where he is clearly ineligible. Every inquirer should receive an explanation of the application requirements and an application should be taken if he indicates that he wishes to file. If an individual makes no mention that he wishes to file but is not satified with the information about his eligibility, it should be suggested that he file an application so that a determination may be made.

The first two sentences are a description of the applicant's best interest, not an order to the agent. There was no need to inform Mrs. Hansen of the application requirement since she knew all about it. Connelly's breach lay in not advising her or fully informing her of the advantages of filing and suggesting that she file. He did not "deter an individual from filing solely on the basis that he is not eligible." He simply advised perhaps correctly on the few facts confided to him, that she was not eligible and did not press her to file.

dure distinction was exposed long ago in *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079 (1945). Congress did *not* wish all those eligible for divorced mother's security benefits to receive them as from the date of their eligibility. It wished such benefits to flow only to those applying for them as prescribed by HEW for a period beginning not earlier than a year before the application. This is substance in the sense that it significantly affects the result, not "merely the manner or means by which a right to recover . . . is enforced." *Guaranty Trust Co.* v. *York*, *supra*, 326 U.S. at 109, 65 S.Ct. at 1470. The fact that in no event may payment for preapplication benefits exceed one year does not bespeak an overmastering Congressional desire that no eligible applicant shall go unpaid. Thus, the linchpin of Judge Newman's opinion—that Congress intended all those who were eligible to receive benefits —completely fails. There is simply no legitimate basis for a court, pursuing its own ideas of what would be desirable, to isolate one aspect of a governmental program as the "pertinent policy" while relegating other aspects, whether provided by Congress itself or the agency to which Congress has entrusted administration of the program, to some inferior status.

To sum up, no one supports affirmance of the district court's order on the grounds on which it was rested, namely, that the regulation requiring a written application was invalid or that Connelly refused to allow Mrs. Hansen to file one. Affirmance likewise cannot rest on the new ground of misconduct now brought forward. What Connelly affirmatively told Hansen, namely, that she was not eligible, has never been determined to be misconduct, based on the in-

formation provided him; surely it was nothing like the clear affirmative misconduct in *Merrill*. Neither is what Connelly did not tell Hansen, that she should apply in writing though he considered her ineligible, misconduct in any legally relevant sense, as pointed out last term in *Caceres*. Finally the majority is also dispensing with the "affirmative misconduct" prerequisite based on the *Hibi* dictum and our *Corniel* decision, since in no realistic sense can Connelly's failure to encourage Hansen to apply in writing be deemed *affirmative* conduct. The majority is simply disregarding the Supreme Court's decisions in *Merrill*, *Montana* and *Hibi*, and placing ourselves in square conflict with the decisions of most, indeed probably all other courts of appeals in similar cases —and all this on an exceedingly weak set of facts and a newly found jurisprudential distinction which cannot survive analysis. There are some rules of federal law that had best left unchanged until Congress decides to alter them even when the result is much harsher than here. This is one of them.

The judgment should be reversed with instructions to dismiss the complaint.

NEWMAN, Circuit Judge, concurring:

I concur fully in Judge Oakes' opinion for this Court. I write only to emphasize the importance of that opinion's substantive-procedural distinction as both the explanatory and the limiting principle for our decision upholding estoppel against the Government. Judge Friendly's vigorous dissenting opinion concludes that the case law has generally opposed estoppel of the Government, and that the substance-procedure distinction cannot be maintained in this

context. My review of the authorities persuades me that estoppel of the Government enjoys considerable support and that the substance-procedure distinction makes the doctrine especially appropriate in the circumstances of this case.

In *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947), the Supreme Court declared that, as a general rule, the Government would not be bound by the incorrect and misleading statements of its agents. See *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791 (1917). The principal thrust of this decision was that the rules governing the estoppel of private parties were not applicable to the Government, 332 U.S. at 383-84, 68 S.Ct. at 2-3, see *Utah Power & Light Co., supra*, 243 U.S. at 409, 37 S.Ct. at 391, not that an estoppel against the Government was impermissible under any circumstances. The latter point was made explicit in *Montana* v. *Kennedy*, 366 U.S. 308, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961), where the Court said: "we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials." *Id.* at 315, 81 S.Ct. at 1341 (footnote omitted). Moreover, in *INS* v. *Hibi*, 414 U.S. 5, 8, 94 S.Ct. 19, 21, 38 L.Ed.2d 7 (1973), the Court cited *Montana* as recognizing one possible circumstance, affirmative misconduct, that might justify estoppel, although it continued to reserve decision on the resolution of this issue.

Thus, the principle of these decisions is that courts must not apply the private law notion of estoppel to the Government and that the more restrictive circumstances under which estoppel of the Government might arise remain to be articulated. The response of the

lower courts, while uncertain at times, has been generally consistent with this view.[1] While emphatic rejections of estoppel against the Government occasionally appear in passing phrases, see *Dix* v. *Rollins*, 413 F.2d 711, 716 (8th Cir. 1969); *Udall* v. *Oelschlaeger*, 389 F.2d 974, 977 (D.C. Cir.), *cert. denied*, 392 U.S. 909, 88 S.Ct. 2056, 20 L.Ed.2d 1367 (1968), no court of appeals has ruled that estoppel would be unavailable in all circumstances. On the contrary, no fewer than eight circuits, including this one, have stated that there are some circumstances in which the Government will be estopped.[2] *Corniel-Rodriguez* v. *INS*, 532 F.2d 301 (2d Cir. 1976); *Walsonavich* v. *United States*, 335 F.2d 96 (3d Cir. 1964); *Tuck* v. *Finch*, 430 F.2d 1075 (4th Cir. 1970); *Simmons* v. *United States*, 308 F.2d 938, 945 (5th Cir. 1962); *United States* v. *Fox Lake State Bank*, 366 F.2d 962 (7th Cir. 1966); *United States*

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[1] Judge Friendly's dissent, in discussing some of the leading cases that have imposed estoppel on the Government, suggests that the authority of these cases is limited by the unusual nature of their factual situations, *supra*, at 950-951 (discussing *Corniel-Rodriguez*), *supra*, at 954 n.4 (discussing *Tuck*). This proves that the cases do not support estoppel of the Government in all possible circumstances, a fact that no one contests. But it also proves that there are some circumstances, varying from circuit to circuit at the present time, in which the Government will be estopped. The issue in this case is to determine what those circumstances should be.

[2] *See* K. Davis, *Administrative Law Text*, § 17.01 at 343 (3d ed. 1972) (sounder position is "that the doctrine of equitable estoppel may apply to the government when justice so requires"); F. Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrine in Administrative Law*, 53 Colum. L. Rev. 374 (1953).

v. *Wharton*, 514 F.2d 406 (9th Cir. 1975); *Massaglia* v. *Commissioner*, 286 F.2d 258, 262 (10th Cir. 1961) (dictum); *Semaan* v. *Mumford*, 335 F.2d 704, 706 (D.C. Cir. 1964). The principle is particularly well-established in this Circuit. *See Corniel-Rodriguez, supra; Miller* v. *United States*, 500 F.2d 1007 (2d Cir. 1974); *Podea* v. *Acheson*, 179 F.2d 306 (2d Cir. 1950) (conclusion that plaintiff's waiver of citizenship was not binding for reason of duress supported by erroneous nature of Government advice to plaintiff);[3] *Tonkonogy* v. *United States*, 417 F.Supp. 78 (S.C.N.Y. 1976). These decisions have not purported to evolve a standard for determining when the Government is estopped. That task requires further analysis of the cases, those that have upheld an estoppel and those that have not.

In *Merrill* the Supreme Court refused to apply the private law notion of estoppel to the Government because the Government's policies, unlike those of a private party, have general social significance. These policies, the Court reasoned, should not be at the mercy of an errant government official. When a private organization is involved, the only consideration in deciding an estoppel question is the relative equities between that organization and the party whom it has misled. But society has an overarching interest in the substantive policies established by its government. That interest justifies (though reasonable minds might differ as to whether it compels) adherence to those policies, even when the reason

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[3] Though *Podea* did not explicitly mention estoppel, as Judge Friendly's dissent points out, the Supreme Court has viewed the case as an instance in which "the United States is estopped." *Montana* v. *Kennedy, supra*, 366 U.S. at 315 & n.11, 81 S.Ct. at 1341.

a person finds himself outside the scope of the pertinent policy stems in part from conduct of a government official. Even then, estoppel might be available, as the Supreme Court indicated in *Montana* and we held in *Corniel-Rodriguez*, if the governmental conduct on which the claimant relied was affirmative misconduct. See *United States* v. *Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973); *cf. Semaan* v. *Mumford*, *supra* (Government estopped from denying employee permanent status after having misled him to believe that such status had been granted). The maintenance of governmental policies need not be so absolute as to perpetuate the myth that the king can do no wrong.

However, when a claimant is within the substantive scope of the pertinent legislative policy, but ineligible because of a procedural default attributable in part to conduct of a government official, the rationale for rejecting estoppel or limiting it to cases of affirmative misconduct disappears. In that situation, public policy favors the granting of the benefit, not its denial. Persons within the class for whom benefits are intended are, of course, normally obliged to follow procedural requirements to establish their entitlement. Procedural requirements, like the written application rule at issue in this case, serve important interests. But when the failure to observe the procedural requirement is caused by conduct of a government official, an estoppel to prevent the Government from asserting procedural noncompliance means that the substantive legislative policy will be carried out. On the other hand, permitting the Government to precipitate the procedural default and then to assert it as a defense means that the substantive legislative policy will be frustrated.

The decided cases have implicitly observed this distinction. Courts have refused to estop the Government, frequently in circumstances more compelling than those of Mrs. Hansen, when the relief would have conflicted with substantive policies established by Congress. In *Merrill*, two farmers, misinformed by an official that spring wheat planted on reseeded winter wheat acreage was insurable, planted their spring wheat on the winter acreage and were denied crop insurance. In *Montana*, *supra*, an alien, born abroad when his pregnant mother was incorrectly denied return to the United States, was denied citizenship. In *Goldberg* v. *Weinberger*, 546 F.2d 477 (2d Cir. 1976), *cert. denied*, 431 U.S. 937, 97 S.Ct. 2648, 53 L.E.2d 255 (1977), a woman, incorrectly told by a Social Security official that she could remarry before her sixtieth birthday without losing widow's benefits, did remarry before age 60 and was denied widow's benefits. In each of these cases the consequences confronting the plaintiffs were to some extent attributable to conduct of a government official. But none of the plaintiffs was substantively entitled to the claimed benefit. The Merrills planted uninsurable wheat, Montana was born abroad, and Mrs. Goldberg remarried before age 60. Moreover, in each instance the basis of ineligibility was related to a substantive public policy. In *Merrill* the policy concerned the reseeding of winter wheat acreage. In *Montana* the policy concerned foreign citizenship resulting from birth abroad. In *Goldberg* the policy concerned the economic needs of widows who remarry before age 60.

In contrast, when conduct of a government official has precipitated a procedural default, courts have refused to permit the Government to assert that de-

fault as a defense.[4] In *Miller* v. *United States, supra,* this Court held that the merits of a taxpayer's refund suit must be considered despite its late filing when the lateness was attributable to erroneous information from a government official. Congress had authorized Miller to contest the merits of his tax dispute, and estopping the Government from relying on procedural default for which it shared some responsibility carried out the Congressional purpose. See *Tuck* v. *Finch, supra* (Government estopped from denying Social Security benefits for failure to file tax returns showing self-employment income); *Brandt* v. *Hickel,* 427 F.2d 53 (9th Cir. 1970) (Government estopped from rejecting application for lack

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[4] Of course, even procedural defaults cannot be excused unless the conduct of a government official bears at least some causal relationship to the procedural non-compliance. *INS* v. *Hibi, supra,* can be considered to be a case involving a procedural default, the filing 17 years late of a claim for naturalization. But Hibi's claim was that the Government should have undertaken positive steps to inform him of his rights, such as publicizing his rights in the Philippines or stationing an INS official there. In rejecting this claim, the decision did not reject the principle that the Government may be estopped from asserting procedural default; it simply noted the total absence of any conduct on the part of the Government that would have justified an estoppel even against a private party. The Government risks estoppel by deterring procedural compliance, not by failing to guaranty compliance.

Determining what conduct will suffice to support an estoppel will understandably precipitate various conclusions, as evidenced by the difference between the results in this case and that in *Cheers* v. *Secretary of HEW,* 610 F.2d 463 (7th Cir. 1979), and *Leimbach* v. *Califano,* 596 F.2d 300 (8th Cir. 1979). Differing assessments of the significance of particular governmental conduct should not, however, obscure the principle that estoppel is available against the Government in cases involving procedural default.

of temporal priority); *Walsonavich* v. *United States*, *supra* (Government estopped from denying tax refund for failure to file timely refund claim); *Smale & Robinson, Inc.* v. *United States*, 123 F.Supp. 457 (S.D. Cal. 1954) (same); *cf. United States* v. *Fox Lake State Bank*, *supra* (Government estopped from penalizing bank from submitting inadequate claim forms).

The Congressional policy pertinent to this case is that a divorced mother of minor children, whose former husband dies after reaching insurable status under the Social Security system, should receive benefits.[5] Mrs. Hansen is indisputably within the class for whom the benefits were intended. Whether or not the conduct of the Social Security official was in breach of an internal office manual,[6] it was conduct that precipitated her procedural default. There is room for reasonable dispute as to what

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[5] The fact that Congress prescribed an application procedure surely does not detract from the substance of the policy to extend benefits to all who meet the demographic criteria. Congress did not make these benefits available in the secret hope that few of those eligible would apply, much less that some, like Mrs. Hansen, would attempt to apply only to be deflected from that objective by the conduct of a Social Security employee. In a very real sense Congress wants those who meet the substantive criteria to receive their benefits. Why else would it provide funds for an elaborate network of local Social Security offices and spend additional funds to inform the public of Social Security benefits?

[6] I agree with Judge Friendly that Connelly's noncompliance with the internal office manual is not a dispositive factor in favor of Mrs. Hansen's claim. Nevertheless, his conduct, however characterized, is sufficient to estop the Government from denying Mrs. Hansen her benefit on the basis of her resulting procedural default.

actually happened when Mrs. Hansen visited the Social Security office. But regardless of how this panel might have found the facts, the ALJ, who heard the witnesses, found that when Mrs. Hansen asked if she should file a written application, the Social Security employee "responded" by advising her she was not eligible. Even if he honestly but mistakenly believed she was ineligible, his response was the cause of her not filing.[7] The ALJ, after hearing all the evidence, found facts that would justify an estoppel. He declined to apply one only because he did not believe that the applicable legal principles made an estoppel available.

Judge Friendly argues in dissent that there is no real distinction between substantive and procedural ineligibility because Congress did not want to grant the benefit to a person who fails to file in the manner prescribed by the agency any more than it wanted to grant the benefit to a person who fails to qualify. But there is surely a real difference between these two Congressional commands. The substantive qualifications are the very purpose of the legislation, motivated by major social policy considerations. The procedural requirements are simply a means of im-

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[7] The dissent expresses some concern about the ease with which a claimant may assert that governmental conduct contributed to procedural default, noting the difficulty a bureaucracy will have in rebutting allegations concerning one of many thousand indistinguishable events. But the claimant makes the allegation under oath and subject to cross-examination. Testimony thus given, if accepted by the fact-finder, is sufficient to send people to prison, even when the witness stands to gain far more than a Social Security benefit. No fact-finding process can preclude error, but the risk of occasionally failing to detect a lie should not deny benefits to those who tell the truth.

plementing that purpose. They are designed to identify eligible individuals and deliver the benefits to them as fairly and efficiently as possible. To reject a qualified applicant because of a procedural defect for which a government official is responsible is to frustrate the purpose of the statute, not to uphold it.

Another objection of Judge Friendly's is that the substantive-procedural distinction is inappropriate in the context of this case because, in the language of *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079 (1945), the application requirement concerns substance in the sense that "it significantly affect[s] the result," and does not concern "merely the manner and the means by which a right to recover . . . is enforced." [8] Even in the terms of *Guaranty Trust*, a requirement that benefits be applied for in writing seems closely analogous to the "means by which a right to recover . . . is enforced." But more significantly, the most enduring teaching of *Guaranty Trust* is that the terms

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[8] It is somewhat surprising to see matters classified as substantive because they significantly affect the result. That outcome-determinative test, subsequently applied by the Supreme Court to decide the reach of the Federal Rules of Civil Procedure in diversity cases, *e.g.*, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949), has since been modified, *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), and later substantially eroded, *Hanna* v. *Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), ever in the context of choosing between federal and state law. As Professor Wright has observed, "It is difficult to conceive of any rule of procedure that cannot have a significant effect on the outcome of a case." C. Wright, Handbook of the Law of Federal Courts 273 (1976).

"substance" and "procedure" do not have constant meanings in all contexts. "Each implies different variables depending upon the particular problem for which it is used." *Id.* at 108, 65 S.Ct. at 1469. In the context of determining when it is appropriate to consider the Government estopped by the conduct of its agents, the distinction can sensibly be drawn between substantive policy, which concerns definition of the class to whom benefits are extended, and procedure, which concerns the method by which any one person establishes eligibility. There may well be reasons why Congress would not want benefits extended to those not substantively eligible, even if governmental conduct contributed to ineligibility, but it is hard to imagine why Congress would want benefits denied to a person for whom the benefits are intended when governmental conduct has been a cause of that person's failure to make proper application.

Judge Friendly also voices the concern that permitting estoppel in these circumstances will create a drain upon the public treasury. Perhaps this would be true if estoppel were permitted to provide benefits to those who fail to meet the substantive requirements of the statute, but the rule applied in this case entirely avoids that danger. The only people who will gain from this decision are those who are substantively qualified: those whom Congress intended to receive the benefit. Such people cannot truly be a drain upon the public treasury, since they should have received the money in the first place. The actuarial estimates that determine the funding levels of the Social Security trust funds are based primarily on demographic facts. The rate at which Mrs. Hansen's deceased former husband and his employer made social security payments was set at a

level sufficient to provide benefits for those like Mrs. Hansen who are substantively eligible for them. It is possible to imagine, though difficult to believe, that the actuarial estimates took into account the anticipated percent of eligible persons who would fail through ignorance, laziness or other cause unrelated to the conduct of Social Security personnel to file written applications.[9] But it is not even imaginable that an estimate was made of the number of eligible persons who would appear at Social Security offices inquiring about the filing of written applications only to be deterred by an employee's misinformation as to their eligibility and his failure, contrary to office instructions, to encourage the filing of a written application. The point is that this decision does not drain the public fisc of one dollar that is being spent either in excess of anticipated benefit levels or contrary to a substantive policy decision of the Congress.

Of course impact upon the public fisc is not irrelevant to this or any other case where monetary claims are asserted against the Government. The dissent's apprehension about the cost of ascertaining the facts of eligibility in the absence of a written application has undeniable force as a general principle. But it has no application to this case. To establish her eligibility Mrs. Hansen needed proof that

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[9] In fact, the basic document of the Social Security Administration describing the actuarial methodology for the entire Old-Age, Survivors, and Disability Insurance System omits any reference to an estimate of eligible beneficiaries who fail to apply for benefits. "Methodology Involved in Developing Long-Range Cost Estimates for the Old-Age, Survivors, and Disability Insurance System," Actuarial Study No. 49. U.S. Department of Health, Education, and Welfare, Social Security Administration, Division of the Actuary (May 1959).

she married and later divorced her former husband, that he is dead, that he has minor children who are the offspring of that marriage, and that he had insured status. The last-mentioned fact is entirely within the knowledge of Social Security, and the first three, properly to be proved by her, are not in dispute, nor has any claim been made that the Government has been put to any expense to verify these facts. Mrs. Hansen is indisputably a member of the class for whom the benefits were intended and paid for, and no hardship or expense has been sustained by the Government in determining that fact.

Estopping the Government from reliance on a procedural default is especially appropriate in the context of a program like Social Security. It is designed to confer benefits to millions of people who are not expected to need legal advice to present their claims. Moreover, the system is administered by a vast network of local offices for the very purpose of assisting individuals to obtain their benefits. I concur not because the amount of money Mrs. Hansen seeks is small, but because it is only fair that it be paid.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of March one thousand nine hundred and eighty.

Present:

HON. HENRY J. FRIENDLY
HON. JAMES L. OAKES
HON. JON O. NEWMAN

Circuit Judges

79-6125

ANN HANSEN, PLAINTIFF-APPELLEE

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Vermont

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

by: Edward J. Guardaro,
EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of September one thousand nine hundred and eighty.

Present:

HON. HENRY J. FRIENDLY
HON. JAMES L. OAKES
HON JON O. NEWMAN,
Circuit Judges

79-6125

ANN HANSEN, PLAINTIFF-APPELLEE

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT-APPELLANT

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 16th day of September, one thousand nine hundred and eighty.

79-6125

ANN HANSEN, PLAINTIFF-APPELLEE

—against—

PATRICIA ROBERTS HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT-APPELLANT

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, and a poll of the active judges having been taken, and there being no majority in favor thereof,

UPON CONSIDERATION THEREOF, it is

Ordered that said petition be and it hereby is DENIED.

Judges Mansfield, Mulligan, Timbers, Van Graafeiland and Meskill voted in favor of rehearing en banc.

/s/ Wilfred Feinberg
WILFRED FEINBERG
Chief Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action File No. 77-219
ANN HANSEN

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF
HEALTH, EDUCATION AND WELFARE

OPINION AND ORDER

Plaintiff Ann Hansen seeks retroactive benefits as a divorced mother under the Social Security Act for the year preceding June 12, 1974. Although defendant Secretary of Health, Education and Welfare (the Secretary) concedes that she has been otherwise eligible under the statute since 1973, he denied benefits for the period in question because plaintiff did not complete a written application until May 7, 1975.[1] After a hearing, the Administrative Law Judge (ALJ) finding support for his conclusion in certain decided cases ruled against plaintiff's contention that she met the statutory application requirement when she visited the Newport, Vermont Social Security Office on June 12, 1974 and orally requested benefits. When the Appeals Council affirmed the ALJ, plain-

[1] Based on 42 U.S.C. § 402(j)(1), the Secretary allowed retroactive benefits for only twelve months prior to the date of plaintiff's written application.

tiff properly sought review in this court. 42 U.S.C. § 405(g). Since the parties agree on the essential facts, the court must address their cross motions for summary judgment. We grant plaintiff's motion and deny that of the Secretary.

FACTS

As we have already noted, the Secretary admits that plaintiff has been eligible for Social Security insurance benefits as a divorced mother since 1973, thus the only pertinent facts are the events surrounding plaintiff's visit to the Newport Social Security Office on June 12, 1974. Plaintiff testified that when she heard from a fellow employee and a local attorney that she might be eligible for benefits she went with her mother to the local Social Security office. Record at 59-60. At the office, she had a ten to fifteen minute interview with Dan Connelly, an employee of the Social Security Administration (SSA). Connelly does not recall the meeting; however, his Contact Tally Sheet for June 12, 1974 includes the last names of plaintiff and her two sons. Record at 13, 112. According to the ALJ's opinion:

> At the hearing, the claimant testified that on June 12, 1974, she went to the Newport, Vermont District Office to apply for Divorced Mother's Insurance Benefits. She was interviewed by Mr. Dan Connelly. The interview lasted about ten to fifteen minutes. This interviewer advised the claimant that she was not eligible for such benefits. The claimant testified that the interviewer question her marital status and she assured him she had been married to the wage earner. When she advised him that she has been

> divorced from her husband, he replied, "that's it. It's because you're divorced that you're not eligible." The claimant testified he gave no other explanation and nothing else was said.
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> * * * * *
>
> On her first visit to the District Office, [Connelly] did not ask her if she wanted to file an application. When she asked him if she should, he responded by advising her she was not eligible. She testified she was not given a form by the interviewer, nor did he suggest or encourage her to file one and he didn't explain the advantage of filing an application.

(Record at 12-13).

Plaintiff's mother also testified at the hearing. Although she was in a separate room during the interview, she verified that she accompanied plaintiff to the SSA office. When plaintiff emerged from the interview, according to her mother, she was agitated at Connelly's rude inferences that she had never been married. Plaintiff also informed her mother that she had been told she was not eligible.[2] Record at 66-68.

DISCUSSION

Under the Social Security Act a person is not eligible for mother's insurance benefits unless she "has filed application" for them. 42 U.S.C. § 402

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[2] Plaintiff apparently accepted Connelly's erroneous decision that she was ineligible, because she did not inquire further or return to the SSA office until nearly a year later on May 7, 1975. She acted then after reading a booklet SSA sent to her son which indicated that she was eligible.

(g)(1)(D). The Secretary, pursuant to authority granted him in 42 U.S.C. § 405(a) to promulgate regulations governing the administration of the Social Security Act, has limited the term "application" "only to an application on a form prescribed in § 404.602 . . . ." 20 C.F.R. § 404.601(c) (the Regulation). Based on the Regulation, the Secretary concluded that plaintiff's oral request on June 12, 1974 to file an application did not fulfill the statutory requirement. We are aware that we should afford the Secretary's interpretations of the Social Security Act great weight, however, we find the Regulation too restrictive as it applied to this case.

On the subject of statutory interpretation, Judge Learned Hand has said:

> . . . it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. *Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1946). More than once, the Second Circuit has written, ". . .'the Social Security Act is a remedial statute, to be broadly construed and liberally applied.'" *Bastien* v. *Califano*, 472 F.2d 908, 912 (2d Cir. 1978) (quoting *Gold* v. *Secretary of H.E.W.*, 463 F.2d 38, 41 (2d Cir. 1972)); "in consonance with its humanitarian aims," *Eisenhauer* v. *Mathews*, 535 F.2d 681, 686 (2d Cir. 1976). In light of these instructions and the facts presented here, we cannot read the words, "filed application" to deny plaintiff benefits because she did not fill out a

form.[3] We think it is particularly significant that plaintiff asked to complete an application but was denied that opportunity. The Regulation may be reasonable when SSA employees follow the explicit directions in the Social Security Claims Manual to inform an applicant of the advantages of filing an application and to suggest filing even in cases of doubtful eligibility. Social Security Claims Manual § 2003, Record at 34-36. But here, Connelly not only did not suggest that plaintiff file, but refused her request to do so; in these particular circumstances the Regulation is unreasonably restrictive.

Although the Secretary has referred us to one unreported decision[4] which strictly applied the written application requirement, we find greater support for the view we have expressed in *Tuck* v. *Finch*, 430 F.2d 1075, 1077 (4th Cir. 1970); *Leimbach* v.

---

[3] "In practical terms . . . when a Social Security Act provision can reasonably be construed in favor of the one seeking benefits, it should be so construed." *Damon* v. *Secretary of HEW*, 557 F.2d 31, 33 (2d Cir. 1977). *See Broussard* v. *Weinberger*, 499 F.2d 969, 970 (5th Cir. 1974); *Ziskin* v. *Weinberger*, 379 F. Supp. 124, 126 (S.D. Ohio 1973). *Cf. Williams* v. *Richardson*, 523 F.2d 999, 1002 (2d Cir. 1975) (equitable adoption concept recognized "for the purpose of allowing benefits absent strict compliance with statutory requirements").

[4] *Goff* v. *Weinberger*, [1975-76 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 14,470 (D. Conn. 1975), *aff'd mem.*, 538 F.2d 309 (2d Cir. 1976) (oral opinion not citable as precedent). In *Goff*, Judge Clarie distinguished a contrary Fourth Circuit decision, *Tuck* v. *Finch*, 430 F.2d 1075 (4th Cir. 1975), because in the case before him SSA files contained no written record of the plaintiff's inquiry. In the instant case, however, Connelly's Contact Tally Sheet for June 12, 1974 records plaintiff's visit.

Califano, 450 F. Supp. 245, 246 (E.D. Mo. 1978); and *Holmes* v. *Weinberger*, 423 F. Supp. 149, 152-54 (E.D.N.Y. 1976).

Accordingly, we grant plaintiff's motion for summary judgment and deny defendant's cross-motion.

Dated at Burlington in the District of Vermont, this 25th day of April, 1979.

/s/ Albert W. Coffrin
ALBERT W. COFFRIN
District Judge

APPENDIX F

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

P.O. Box 2518, Washington, D.C. 20013

September 1, 1977

IHA-2
009-16-8115

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mrs. Ann Hansen
59 Glen Road
Newport, Vermont 05855

Dear Mrs. Hansen:

After your request for review of the hearing decision was received, a careful study was made of your case, the applicable law and regulations, and the factual and legal arguments presented in the brief filed on your behalf.

The Appeals Council has decided that the decision is correct. Further action by the Council would not, therefore, result in any change which would benefit you. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date

shown above, unless a reasonable showing is made otherwise. See section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)), and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant. Also, please include your social security number in the Bill of Complaint.

RR, RSI, NPSC, Flushing, NY
DO, Montpelier, VT
HO, Manchester, NH (ALJ Milne)

Sincerely yours,

/s/ Edwin C. Satter, III
EDWIN C. SATTER, III
Member, Appeals Council

cc:

Mr. Lander B. Rubin
Attorney at Law
St. Johnsbury, Vermont 05819

APPENDIX G

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
Bureau of Hearings and Appeals

DECISION

In the case of
ANN RIEGEL HANSEN, CLAIMANT
WALLACE M. RIEGEL, JR., WAGE EARNER

Claim for

Divorced Mother's Insurance Benefits
S.S. No. 009-16-8115

This case comes for hearing and decision by a request for hearing filed by the claimant.

ISSUES

The general issue is whether the claimant is entitled to Divorced Mother's Benefits retroactive to June 12, 1973. The specific issue is whether a filing date of June 12, 1974 can be established based upon an intent to file a claim on the part of the claimant on that date.

LAW AND REGULATIONS

Section 202(g)(1)(d) of the Social Security Act, (42 U.S.C. 402(g)(1)(d)), provides that a claimant applying for Divorced Mother's Benefits must file an application for Mother's Insurance Benefits.

Section 202(j)(1) of the Social Security Act (42 U.S.C. 402(j)(1)), provides for a limitation of retroactivity of benefits based upon the filing of an application to twelve (12) months prior to the application date.

Section 404.601(c) of Social Security Administration Regulation No. 4 (20 CFR 404.601), defines an application on a form prescribed in Section 404.602 of Regulation No. 4.

Section 404.602 of the Social Security Administration Regulation No. 4 (20 CFR 404.602), provides in part, that applications shall be made as provided in Subpart G of Regulation No. 4 on such forms and in accordance with such instructions (provided thereon or attached thereto) as are prescribed by the Administration.

Section 422.505(a) of Social Security Administration Regulation No. 4 (20 CFR 422.505(a) provides in part that the application form to be used by a surviving divorced mother to file a claim for Mother's Insurance Benefits under Title II of the Social Security Act is designated as SSA-5.

Section 404.613(a) of Social Security Administration Regulation No. 4 (20 CFR 404.613(a) provides in part that where an individual files a written statement with the Administration that indicates an intention to claim monthly benefits and such statements bears his signature or his mark properly witnessed, the filing of such written statement is, unless otherwise indicated, considered to be the filing of an application provided a prescribed application form is filed within six (6) months from the date of such notice.

EVIDENCE CONSIDERED

All the testimony given at the hearing and the documents described in the List of Exhibits attached to this decision have been carefully considered.

SUMMARY AND EVALUATION OF THE EVIDENCE

The claimant testified that she went to the District Office in Newport, Vermont, on June 12, 1974, to apply for Divorced Mother's Insurance Benefits. She was advised by the interviewer that she was not eligible for such benefits.

The claimant did not file an application at that time. She subsequently filed an application for said benefits in the same District Office on May 7, 1975, and was awarded benefits. The claimant was advised that she had been eligible for benefits on June 12, 1974, when she first came to the District Office. The claimant filed a request for retroactive benefits to June 12, 1973, on the basis of her intention to apply on June 12, 1974. Her request was, upon reconsideration, denied, and the claimant filed this timely request for hearing.

At the hearing, the claimant testified that on June 12, 1974, she went to the Newport, Vermont District Office to apply for Divorced Mother's Insurance Benefits. She was interviewed by Mr. Dan Connelly. The interview lasted about ten to fifteen minutes. This interviewer advised the claimant that she was not eligible for such benefits. The claimant testified that the interviewer questioned her marital status and she assured him she had been married to the wage earner. When she advised him that she has been divorced from

her husband, he replied, "that's it. It's because you're divorced that you're not eligible." The claimant testified he gave no other explanation and nothing else was said.

The claimant testified that the reason she went to the District Office to apply in June 1974, was because she was advised by a friend and coworker as well as an attorney that she was eligible for benefits and should apply for them. In spite of this advice she did not press the issue of filing an application when advised that she was not eligible, as she believed the interviewer was correct in his assessment. During the period from June 1, 1974 to May 7, 1975, she made no further contact with the District Office.

She further testified that she subsequently received a Social Security publication in the mail regarding various aspects of applying for benefits which prompted her to contact the District Office again, at which time she was advised by the interviewer that she was eligible for Divorced Mother's Insurance Benefits at the time she first came to the District Office on June 12, 1974.

On her first visit to the District Office, the interviewer did not ask her if she wanted to file an application. When she asked him if she should, he responded by advising her she was not eligible. She testified she was not given a form by the interviewer, nor did he suggest or encourage her to file one and he didn't explain the advantages of filing the application.

The claimant's mother accompanied her to the office on that occasion and she testified that she remained in the waiting room during the interview. She did

not hear what was said during the interview, but testified that upon completion of same, the claimant was very upset and told her that she was advised she was not eligible for benefits.

Exhibit 11 consists of a compilation of Contact Station Tally Sheets for the period April 17, 1974 to June 19, 1974. Page eleven (11) of that exhibit consist of the Contact Tally Sheet for June 12, 1974 and includes the names Riegel, Riegel and Hansen with the notation "PAD" (post adjudication action). The claimant's name was not noted on any of the other tally sheets contained in the exhibit. Exhibit 7 consists of a Report of Contact form completed on September 11, 1975, by Mr. Daniel J. Connelly, wherein he states that he reviewed the tally sheets for May 1974, and did not see the claimant's name listed, but did note her name on the sheet for June 12, 1974. He stated in his report that he was not sure if he talked with the claimant on that date and if he did, he could not recall the substance of the interview.

Based upon a preponderance of the evidence in the record and the testimony at the hearing in this matter, it appears that the claimant did contact the Newport District Office on June 12, 1974. Notwithstanding the fact that Mr. Connelly, in his statement (Exhibit 7), does not recall talking with the claimant and even if he did, does not recall the substance of that conversation, it is not unreasonable to conclude, based on the claimant's testimony, that she did go there to apply for Divorced Mother's Benefits and that she was advised was not eligible. Even assuming this fact, the issue to be decided now is whether that contact in and of itself, constituted the filing of an application pursuant to the applicable

law and regulations. The evidence indicates that Mr. Connelly did not refuse to give the claimant an application form or refuse to allow her to file an application. He merely advised the claimant regarding her eligibility and she decided not to press the issue and have her eligibility determined by the Administration in accordance with the usual procedure. It is also noteworthy that the claimant failed to indicated to Mr. Connelly that she had been advised that she was eligible not only by a friend, but also by an attorney. In spite of this she failed to press her claim at the time and did not even contact the agency for almost a year. The claimant, through her attorney, has submitted a legal brief outlining the legal precedent which she believes supports her contention. The brief raises two theories upon which the claimant should prevail, namely, that in the first instance her contact with the District Office or "oral attempt to apply for benefits" satisfies the statutory requirements of 202(g)(1)(d) and (j)(1) (20 CFR 402 (g)(1)(d) and (j)(1)), and does so in spite of the provisions of 20 CFR 404.601. Secondly, the claimant is entitled to benefits based on the theory of estoppel and the Administration should be prevented from relying on the respective law and regulations based upon the fact that the claimant's action or lack thereof, was the direct result of the misinformation provided to her by the Social Security interviewer. The facts as they relate to the applicable law and regulations will be first discussed and then the arguments presented in the claimant's brief will be reviewed.

At the time of the first contact with the District Office in June 1974, the law and regulations governing the filing of applications for the benefits in ques-

tion were contained in Section 202(g)(1)(d) and (j)(1) of the Social Security Act (42 U.S.C. 404 (g)(1)(d) and (j)(1)) and Section 404.601 of Social Security Regulation No. 4 (20 CFR 404.601). Section 202(g)(1)(d) specifically makes reference to the fact that as a condition of entitlement to such benefits the claimant shall have filed an application for Mother's Insurance Benefits. Also, Section 202 (j)(1), in discussing the provisions for retroactive benefits, specifically makes reference several times to the fact that a claimant has filed an application for benefits. It is true that it is not specified whether the application shall be written or oral. For a determination of that issue we must review the provisions of Section 404.601 (20 CFR 404.601), which in part defines an application in subsection (c) as an application on a form prescribed in Section 404.602 of the Regulation. In turn, that Section provides that such written application shall be on forms prescribed by the Administration. Section 422.505 of the Regulation (20 CFR 422.505) specifically indicates that the appropriate form for Mother's Insurance Benefits is known as SSA-5, Application for Mother's Insurance Benefits. Nowhere throughout the Regulation is there any provision for the filing of an oral application. The Social Security Regulations are legal extensions of the Social Security Act and comprise the legal vehicle for the proper implementation of the Act.

There is provision for an exception to the formal written application rule which is contained at 404.613 (20 CFR 404.613) whereby a written statement of an intent to file for benefits will be considered as an application, however, the claimant in this case did not file any written requests for benefits or inquiries.

She did not contact the District Office at all until the time of filing her formal application. Therefore, the only conclusion that can be reached is that the claimant did not satisfy any of the requirements of the law and regulations in effect on June 12, 1974, relative to the filing of a written application or statement of intent to file.

Relative to the issues raised in the claimant's brief and in support thereof, the claimant cites the case of *Holmes* v. *Weinberger*, 423 F. Supp. 149 (EDNY 1976) to support the contention that an oral intent to file for benefits or an oral application satisfies the requirements of the statute. In that case a claimant applied for Child's Insurance Benefits in 1967 and was advised by an employee of the Administration that a claim could not be processed without the wage earner's social security number. A period of five (5) years passed before the claimant filed an application and was awarded benefits. During that time the claimant made several contacts with the District Office by telephone, in person, and also by corresponding with them and always received the same advice. The court in that case considered the Administration's prior regulations allowing for application by oral intent to file a claim as evidence that the Administration construed the application provision of the statute liberally. The regulations in question were changed in 1955 and the court conceded that a literal application of the statute and regulations in effect at the time of its decision would result in a denial of the claim. The claimant here asserts the facts of that case are similar to those presented here. I cannot agree. The claimant made only one contact with the District Office and for a period of one year made no further contacts. She sent no letters as the

claimant did in the cited case. Also, the period of time is much less brief, one year compared to five years.

Even though the case of *Holmes* v. *Weinberger* is to be considered applicable, it emanates from the District Court and not the Circuit Court of Appeals or the United States Supreme Court and is not precedent for this issue.

A second case cited by the claimant is that of *Tuck* v. *Finch*, 430 F. 2d 1075 (4 Cir. 1970). In that case the claimant needed additional quarters of coverage to be entitled to disability insurance benefits based on self-employed income. The claimant was outside the three year, three months, 15 day rule for filing an amended return and so he sought to establish an earlier filing date on the basis of an oral application to toll the time limit provision. In this case the court took into consideration the fact that the claimant was illiterate. Also, in addition to the claimant's initial contact at which time his claim was reviewed, there was a subsequent contact on the part of the District Office with the claimant. Although there may exist some underlying similarity between that case and this one, the particular facts are not similar at all as the claimant alleges.

Assuming that the case of *Tuck* v. *Finch* is applicable to the facts in this case, it is not precedent in the Second Circuit of which Vermont is a part, but only applicable in the Fourth Circuit.

With regard to the issue of estoppel, the claimant cites *Corniel-Rodriguez* v. *I.N.S.*, 532 F. 2d 301 (2 Cir. 1976). In that case the Immigration Department was estopped from deporting an alien because an employee of the Department had failed to give the

alien the necessary information at the time of her entry to the United States, in violation of a Federal regulation requiring the giving out of this information. The claimant contends in her case there was a breach of a similar affirmative duty to inform the claimant of her rights relative to the filing of an application, which duty is prescribed in Section 2003 (a) of the Social Security Claims Manual. In the case cited, the employee's failure to advise the alien constituted a violation of a Federal regulation. The Social Security Claims Manual is not a Federal regulation and nowhere in the Social Security Regulations can there be found such a mandate. In fact, the Second Circuit Court drew a distinction between its decision in the *Corniel-Rodriguez* case and the case of *Goldberg* v. *Weinberger*, 546 F. 2d 477 (2 Cir. 1976) wherein it stated in footnote No. 5 in the Goldberg decision as follows:

> "Our decision in Corniel-Rodriguez v. I.N.S. is not to the contrary. We held there that estoppel may be involved against the government where there is 'noncompliance with an affirmatively required procedure.' We took pains, however, to limit our decision to the specific facts of that case, particularly, the fact that the government employee had failed to provide petitioner with a warning mandated by federal regulations. No such regulations govern Social Security Administration employees."

In *Goldberg* v. *Weinberger*, the claimant who was receiving widow's insurance benefits inquired of the District Office relative to the effects of her remarrying. This was prior to her 60th birthday. She was advised that her benefits would continue but at a reduced rate. The claimant remarried two months

prior to her 60th birthday and benefits ceased. She alleged the Administration should be estopped from denying her benefits based on the erroneous information given to her by the Administration employee. The court did not agree. It stated that it is well established that "estoppel cannot be set up against the Government on the basis of an unauthorized representation or act of an officer or employee who is without authority in his individual capacity to bind the government."

Byrne Organization, Inc. v. *U.S.*, 287 F. 2d 582, 587 (1961); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380. The court further reasoned that "government could scarcely function if it were bound by its employees' unauthorized representations. Where a party claims entitlement to benefits under federal statutes and lawfully promulgated regulations, that party must satisfy the regulations imposed by Congress. Even detrimental reliance on misinformation obtained from a seemingly authorized government agent will not excuse a failure to qualify for the benefits under the relevant statutes and regulations."

It is noted that the case of *York* v. *Weinberger* (E.D. Cal. 1976) cited by the claimant, reached the opposite conclusion in applying the doctrine of estoppel in the case of a claimant who attempted to file for benefits based on the disappearance of her husband and who was advised that she must wait seven years to do so. However, it should also be noted the case was never appealed to the Circuit Court and the Circuit Court for the Second Circuit has passed on the point. Even if the Circuit Court in California has determined the issue it should be noted we would not be bound by its decision. We are bound by the decision in *Goldberg* v. *Weinberger* until such time as the

court either reverses itself or is overruled by a decision of the Supreme Court relative to the issue in question. Also, the York case was characterized by an expanded period of time by comparison with the instant case and several contacts between the claimant and the District Office. In the case of *Goff* v. *Weinberger*, District Court of Connecticut, and affirmed by the Circuit Court of Appeals at 538 F2d 309 (2 Cir. 1976), the plaintiff made an oral inquiry in July 1959 through her attorney relative to her eligibility for Social Security benefits. Her attorney was advised by a District Office employee that since the family was receiving Workmen's Compensation benefits they would not be eligible for Social Security benefits. On January 28, 1971, plaintiff filed for and received benefits retroactive to January 1970. The plaintiff alleged that the misinformation given to her in 1959 dissuaded her from filing a written application and that the oral inquiry of her attorney should be considered as a lawful statement of intent to file an application for benefits thereby entitling her to benefits retroactive to 1959.

The court determined that the factual situation in that case did not conform to the essential requirements of 20 CFR 404.602 and 404.613. The court noted that "the administrative purpose of the Act and its supporting regulations were specifically designed to assure, that only a written expression of intent to claim Social Security benefits should be accepted and considered as a valid application under the law." The court further noted that "the Social Security Act, supplemented by its regulations, was intended to eliminate or at least reduce to a minimum the possibility of fraud, confusion, and laxity in its

administration. The vastness of the program makes it essential to adhere to the written application procedure, if there is to be an orderly and controllable system of management for approving claims and paying out insurance benefits."

Relative to the issue of estoppel, the court adopted the language of the Supreme Court in *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, wherein it stated that "parties dealing with the Government are charged with knowledge of and are bound by statutes and lawfully promulgated regulations despite reliance to their pecuniary detriment upon incorrect information received from Government agents or employees. Estoppel will not lie regardless of the financial hardship resulting from innocent ignorance."

After considering all of the evidence and the arguments and precedent raised in the claimant's brief, it appears that the claimant failed to file a formal or written application for Mother's Insurance Benefits on June 12, 1974, after being advised she was not eligible. She had no further contact with the District Office for almost a year regarding her claim. She had previously been advised by a friend and an attorney that she was eligible for benefits. She filed a formal application on May 7, 1975, and was awarded benefits. The claimant filed no written statement of her intent to file a claim for benefits in June 1974. The facts in the cases cited by the claimant are not significantly similar to the facts in this case. It is important to consider the fact that the claimant was advised by an attorney relative to her rights to collect benefits. According to the evidence she did not consult with the attorney relative to the results of her interview. It is difficult to conceive of the claimant not discussing her situation with anyone during the

ensuing year and yet the evidence bears out the fact that almost one year elapsed before she made another contact with the agency and only after fortuitously receiving a booklet in the mail from the Administration regarding her rights to receive such benefits.

Even assuming the interviewer advised her incorrectly was it reasonable for the claimant not to press the issue and demand that a formal determination be made of her claim by filing an application? The interviewer never advised her she did not have a right to file an application nor did he explicitly refuse to allow her to file an application. Instead, he merely advised the claimant as to his personal opinion that she was not eligible which advice the claimant accepted as a formal and final determination of the matter. Also, was it reasonable for the claimant not to consult with her attorney again subsequent to the interview and to refrain from any contact with the agency for almost one year after having been advised by an attorney in the first instance that in his opinion she was eligible for benefits?

We must be guided by the court's decisions in *Goldberg* v. *Weinberger*, and *Goff* v. *Weinberger*. Consequently, Mr. Connelly cannot bind the Administration by any unauthorized representations. He violated no regulation imposing an affirmative duty to advise the claimant of her rights relative to the filing of an application.

FINDINGS

After careful consideration of the entire record, it is found that:

1. The claimant filed an application for Divorced Mother's Insurance Benefits on May 7, 1975 and was awarded benefits based on that application.

2. The claimant came to the District Office in Newport, Vermont, on June 12, 1974, to file an application for Divorced Mother's Insurance Benefits and was advised by an employee of the Social Security Administration that she was not eligible.

3. The claimant did not file a formal written application on June 12, 1974, nor at any time thereafter until May 7, 1975.

4. The claimant, prior to her interview of June 12, 1974, in which she was advised she was not eligible, had been advised by her attorney that she was eligible and she did not consult with him about the opinion given to her at her interview.

5. The claimant did not file a written statement of intent to file a claim for benefits.

6. The claimant failed to comply with the statutory and regulatory requirements for filing of a written application for benefits as prescribed in Sections 202(g)(1)(d) and (j)(1) of the Social Security Act, and 404.601 of the Social Security Administration Regulation No. 4.

7. The claimant made no contact with the Social Security Administration subsequent to June 12, 1974 and up to May 7, 1975.

8. The oral contact made by the claimant on June 12, 1974, cannot be considered to satisfy the requirements for filing a written application as prescribed in the statute and regulation.

DECISION

It is the decision of the Administrative Law Judge that the claimant has not established an earlier filing date based upon her oral contact with the Social Security Administration on June 12, 1974, and is, therefore, not entitled to Divorced Mother's Insurance Benefits retroactive to June 12, 1973.

/s/ Henry A. Milne
HENRY A. MILNE
Administrative Law Judge

Date: June 24, 1977

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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PATRICIA ROBERTS HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ANN HANSEN, RESPONDENT

NO. 80-1162

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PATRICIA ROBERTS HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ANN HANSEN, RESPONDENT

NO. 80-1162

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Ann Hansen, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case.

QUESTIONS PRESENTED

1. Whether the Secretary of Health and Human Services is required to follow a procedural rule set forth in the Social Security Claims Manual, if said rule affects Respondent's substantive rights regarding her entitlement to Social Security benefits, and if the Secretary's failure to follow said rule results in the Respondent's ineligibility for Social Security benefits.

2. Whether the Secretary of Health and Human Services may be equitably estopped from denying Social Security benefits to Respondent, who satisfies the substantive statutory eligibility requirements, where the sole basis for the denial is that the Respondent fails to satisfy a procedural requirement adopted by the Secretary, and the Respondent's failure to satisfy said procedural requirement is directly attributable to agency action in violation of a provision in the agency's internal manual affecting Respondent's entitlement to benefits.

ADDITIONAL REGULATIONS INVOLVED

1. Section 2003 of the Social Security Claims Manual provides in pertinent part:

> 2003. ADMINISTRATIVE POLICY ON ACCEPTANCE OF APPLICATION
>
> (a) General
>
> Where an individual is inquiring about possible current entitlement to [Retirement, Survivors (including Mother's) Disability, Health Insurance] benefits, his interest will ordinarily be best served by filing an application immediately so that retroactive Title II benefits will be better protected and a determination made on his entitlement. He will also have the right of appeal in the event he is not satisfied with the determination. The individual must make the actual decision of whether or not to file, but he should be fully informed of the application requirements and the advantages of filing. Unless filing is obviously disadvantageous or the question is one of filing for reduced Title II benefits only, it will be appropriate to suggest to the individual that he file an application. Resolve any doubtful situation in favor of suggesting that the individual file since he may withdraw his application later if he wishes.
> A delay in filing should never be suggested because there is no doubt as to the inquirer's eligibility or because extensive development may be necessary. An application should be obtained and development made for a determination. Do not deter an individual from filing solely on the basis that he is not eligible . . . This is true even where he

> is clearly ineligible. Every inquirer should receive an explanation of the application requirements and an application should be taken if he indicates that he wishes to file. If an individual makes no mention that he wishes to file but is not satisfied with the information about his eligibility, it should be suggested that he file an application so that a determination may be made.

STATEMENT

Although respondent is satisfied with most of the Statement of the Case presented by the petitioner, there are several points she would like to make.

First, the petitioner states that "Respondent did not claim, however, that she ever told the [Social Security] representative that her former husband, who would have been 43 years old at that time, was in fact dead." (Petition 6). Judge Friendly, in his dissent, repeatedly stresses this point in support of his argument that the claims representative's advice as to the Respondent's ineligibility was not wrong on the basis of what he knew of the facts as presented to him. (App. A of Petition at 15a, 16a, 25a, 27a-29a, 34a, 35a). This is simply erroneous as the Respondent testified at her hearing:

> Q. Do you remember exactly what he said?
> A. Yes, I do.
> Q. Tell me.
> A. I was very put out because of the questions -
> Q. Will you tell me what he said? Never mind about being put out.
> A. He said to me, "You were never married to the man, were you?
> Q. All right, then what else did he say?
> A. Then he - he said I was not illegible (sic) because I was divorced at the time of my husband's death. He said, "That's it, you were divorced. What was your marital statchus (sic)?"
> (emphasis added)
> (Tr. 61-62; Respondent's App. A, infra, 1a, 2a)

See also, Tr. 50-53; Respondent's App. A, infra, 3a-6a.

The statements at Tr. 50-53 by the Respondent regarding her marital status 'at the time', and indicating that the claims

representative told her that she was not eligible because she was 'divorced at the time', clearly referred to Respondent's marital status at the time of her husband's death. It might not be crystal clear if the record only contained Tr. 50-53, but since the record includes Respondent's testimony as set out at Tr. 61-62, it becomes undeniable that the Petitioner's statements on this point, and Judge Friendly's repeated reference to this fact, are erroneous. The ALJ made no specific finding on this point, probably because it was obvious. The record only supports a finding that the claims representative knew that Respondent's husband was dead at the time he spoke to Respondent. Indeed, implicit in the ALJ's findings is a finding that the Respondent was eligible for benefits at the time she spoke to the claims representative which would necessarily require a finding that her husband was dead. (App. A of Petition, 61a, 63a, 73a).

Although this factual dispute is not dispositive, it should be noted as it does form the basis for many of Judge Friendly's statements, particularly his argument that there was no misconduct or misinformation conveyed by the claims representative given what he knew of the facts as presented to him. In fact, Judge Friendly went so far as to suggest that the claimant <u>herself</u> did not even know that her husband was dead at the time she spoke to the claims representative (App. A of Petition 28a). This is completely erroneous, as the record clearly indicates that Respondent's two children, who were always living with her, applied for and started receiving Social Security benefits as soon as her husband died in 1967, and the only basis for their benefits was his death. Moreover, Respondent herself when she finally filed her written

application for benefits filed for benefits as a widow. (Tr. 57-58; 70; 74; Respondent's App. A, 7a-10a).

Concerning the question of Respondent's oral inquiry regarding her eligibility for benefits, the Petitioner's own written records document the visit, Tr. 112, and the ALJ made specific factual findings regarding: (a) the date and place of the visit; (b) that the Respondent went to apply for benefits; (c) that she was informed by the claims representative that she was not eligible for benefits; (d) that, in response to Respondent's question as to whether she should file an application, the claims representative replied that she was not eligible, and did not give her an application form, nor did he suggest or encourage her to file an application, nor did he explain the advantages of filing an application. (App. G of Petition, 61a-64a). These factual findings are supported by substantial evidence and were so found by the lower courts. (App. A of Petition 3a; App. E of Petition; 52a; 53a; 42 U.S.C. § 405(g)).

Finally, the Petition states that the "Court of Appeals conceded that the Claims Manual was not a legally binding regulation and that the representative's omission did not otherwise constitute affirmative misconduct". (Petition 8, see also, Petition 11-12n.7). It is suggested that this is not an accurate reading of the majority opinion. What the opinion states is ". . . [T]here was no finding of 'affirmative misconduct' if that term is defined to mean intentional violation of a rule having the force of law." (Emphasis added) (App. A of Petition 12a). Contrary to the contention of the Petitioner, the majority never indicated that affirmative misconduct is limited to an intentional violation of a rule

having the force of law, but stated" . . . Misinformation provided by a Government official combined with a showing of misconduct (even if it does not rise to the level of a violation of a legally binding rule) should be sufficient to require estoppel." (App. A of Petition 13a). Thus, it is submitted that the Court of Appeals did find affirmative misconduct in this case, and did not specifically answer the question of whether the Claims Manual is a rule binding on the agency but merely ruled that even if it is not, the same result obtains. All that was stated was that the Claims Manual does not have the force or effect of law as it is not a regulation published in the Federal Register. (App. A of Petition 11a).

The record establishes that the only reason why Respondent failed to file a written application during her first office visit was due to the failure of the claims representative to observe a mandatory and affirmative duty to encourage the filing of written applications. There is thus ample basis for the Court of Appeals' conclusion that the Respondent relied upon the misinformation provided by the claims representative and this constituted affirmative misconduct, justifying the application of estoppel against the Petitioner. (App. A of Petition, 10a; 13a; 14a).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner sets forth three (3) basic reasons why a writ of certiorari should be granted: (1) The decision below cannot be reconciled with a long line of precedent in this Court that the government may not be estopped, unless, perhaps, the government has engaged in affirmative misconduct; (2) The decision below is in square conflict with the decisions of several other courts of appeals; and (3) The decision is important in that it threatens the sound administration of the Social Security program.

Respondent believes the Petitioner's statement of the Question Presented for Review is overly broad, and that the actual questions presented in the case are as stated by the Respondent, and, focusing on these questions, there is no basis upon which to grant the writ of certiorari.[1]

1. This Court has consistently held that federal agencies must follow their own rules and procedures, and are bound by them. See, e.g., CBS v. United States, 316 U.S. 407, 422 (1942); Morton v. Ruiz, 415 U.S. 199, 235 (1974); Accardi v. Shaughnessy, 374 U.S. 260, 265 (1954). Moreover, this Court has followed this holding even if the agency rules are not federal regulations published in the Federal Register, CBS v. United States, supra; Morton v. Ruiz, supra; Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959), and even if the rules adopted were more rigorous than the law required. Morton v. Ruiz, supra, 415 U.S. at 235; Service v. Dulles, supra, 354 U.S. at 388; Vitarelli v. Seaton, supra, 359 U.S. at 539.[2] See also, Thorpe v. Housing Authority, 393 U.S. 268 (1969).

The basis for this rule was well stated in Morton v. Ruiz, supra, 415 U.S. at 235:

> "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."

At issue in Morton v. Ruiz, supra, was a regulation of the Bureau of Indian Affairs which denied General Assistance to Indians who did not live on reservations. This Court noted that

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[1]At the outset, it should be noted that in Weinberger v. Wiesenfeld, 420 U.S. 636, 640 n.6 (1975), this Court and the Petitioner gave tacit approval to oral applications for Social Security benefits.

[2]Thus, Judge Friendly's statement that an agency that issues instructions should not be held to a higher standard than an agency that does not, (App. A of Petition 30a), is in conflict with the cited decisions of this Court.

an unpublished provision of the Bureau's own internal Manual required that the challenged regulation be published, which it was not, Id. at 235, and thus this Court held:

> "Before the Bureau of Indian Affairs may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures."
>
> Id.

Here, the Petitioner is seeking to extinguish the rights of Respondent, who admittedly is otherwise eligible for Social Security benefits, solely on the basis of her failure to comply with the Petitioner's written application regulation, 20 C.F.R. § 404.601, when it is undisputed that the failure to do so was caused by the agency's own failure to follow section 2003 of its Claims Manual.

Since it cannot be denied that Section 2003 of the Claims Manual and the written application requirement are mutually interdependent, the Petitioner, under the clear language of Morton v. Ruiz, supra, cannot extinguish Respondent's entitlement to Social Security benefits when the agency itself caused her ineligibility by failing to follow its own internal procedures.[3]

Petitioner states that she is aware of no decision of this Court holding that an estoppel may lie against the government in any circumstance. Petition 11. Yet, Morton v. Ruiz, supra, and many of the cases previously cited can be viewed as estoppel cases (Morton v. Ruiz, supra - Government estopped from denying General Assistance benefits because it did not comply with its own internal manual in adopting the challenged regulation; Accardi v. Shaughnessy, supra - Government estopped from deporting alien because agency did not follow its own regulations; Service v. Dulles, supra - Government estopped from

[3]Even the court in Leimbach v. Califano, 596 F.2d 300, 302 n.1 (8 Cir. 1979) would concede that Respondent was eligible for the benefits in question, and that the written application merely affects the date of her entitlement.

discharging employee where internal procedure of agency manual was not followed; Vitarelli v. Seaton, supra - Government estopped from discharging employee where agency did not follow internal procedural manual). As Mr. Justice Frankfurter explained in his concurring opinion in Vitarelli v. Seaton, supra, 359 U.S. at 546, 547:

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the regulations that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."

If the preceding cases are not thought of as true estoppel cases, it is submitted that neither should the decision below. An alternative holding in this case, which the Respondent urged upon the Court of Appeals in her Brief at 8-9, would simply be that the Petitioner is bound to follow her own procedural rules, and action taken in violation of those rules, in this case the denial of Respondent's application for benefits for failure to file a written application when the failure was caused by agency action in violation of the Claims Manual, must be invalidated.[4]

Thus, it is submitted that the decision below is not inconsistent with the precedents of this Court, and falls routinely in line with the preceding line of cases.[5]

In a footnote, Petition at 13 n.8, Petitioner cites United States v. Caceres, 440 U.S. 741 (1979) for the proposition that

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[4]As noted earlier, the written application requirement and Claims Manual 2003 must be viewed as interdependent, as it is undeniable that they concern two aspects of the same issue.

[5]See also, Yellin v. United States, 374 U.S. 109, 114 (1963); Estep v. United States, 327 U.S. 114, 121 (1945).

the Claims Manual is not a legally binding regulation and that to hold an agency to a higher standard because it issues guidelines for its employees would have the deleterious effect of discouraging the promulgation of such guidelines. However, United States v. Caceres, supra, at 753 n.14, 19, cited approvingly the previously mentioned line of cases which included cases involving rules which were not legally binding, and which held an agency to a higher standard because it had promulgated rules. This Court distinguished those cases from Caceres, supra, by stating:

> "The APA authorizes judicial review and invalidation of agency action that is . . . taken 'without observance of procedure required by law.' Agency violations of their own regulations, whether or not also in violation of the Constitution, may well be inconsistent with the standards of agency action which the APA directs the Courts to enforce. Indeed, some of our most important decisions holding agencies bound by their regulations have been in cases originally brought under the APA. [Citations omitted].
>
> But this is not an APA case, and the remedy sought is not invalidation of the agency action." Id. at 753-754.

This case, however, is an APA case, as it is a direct appeal from an agency decision, and the remdy sought is invalidation of the agency action.[6] It is not critical that the agency rule that was violated here was not legally binding in

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[6] Morton v. Ruiz, supra; Accaidi v. Shaughnessy, supra; Service v. Dulles, supra; and Vitarelli v. Seaton; supra; were all appeals from agency decisions where the remedy sought was invalidation of agency action. It is clear that the Social Security Administration and Social Security appeals are covered by the APA. See, Blankenship v. Secretary, HEW, CCH Unemp. Ins. Reporter, Paragraph 15,884, n.5, (6 Cir. 1978); Caswell v. Califano, 583 F.2d 9, 15n.13 (1 Cir. 1978) "The Secretary's claim that the APA is not applicable to actions of the Social Security Administration is contrary to both the language of the statute and the case law of this and other circuits . . . We reject it." See, 5 U.S.C. § 551. See also, White v. Mathews, 559 F.2d 852, 861 n.12 (2 Cir. 1977). In fact, the Petitioner cited to the APA, 5 U.S.C. § 553, for the proposition that the Claims Manual is not legally binding, Petition 13n.8, so she would appear to admit, at least for the limited purpose of this case, that the APA does apply in determining whether an agency rule is binding.

the sense that it was not published in the Federal Register, as many of the previously cited cases involved similar rules, coming from internal agency staff manuals. See, Morton v. Ruiz, supra; Service v. Dulles, supra; Vitarelli v. Seaton, supra; Thorpe v. Housing Authority, supra.

Moreover, this Court has cited and relied upon provisions of the Social Security Claims Manual in Mathews v. Eldridge, 424 U.S. 319 336-338, 339-340 (1976) and Califano v. Yamasaki, 442 U.S. 682 686, 694 (1979). In both of these cases this Court held that prior hearings were not required before Social Security benefits were terminated or reduced because of certain Social Security procedural protections, many of which were contained in the Claims Manual. It would be inconsistent to rule that the Claims Manual was not legally binding on the agency, when important decisions of this Court are based upon the procedural protections found in the Claims Manual.[7] Although Judge Friendly disparagingly referred to the Claims Manual as a mere 'housekeeping' manual in his dissent below, App. A of Petition 30a, in other decisions he cited to the very same Claims Manual approvingly as indicative of various protections afforded to Social Security claimants. See, Mills v. Richardson, 464 F.2d 995, 998-999 (2d Cir. 1972); Frost v. Weinberger, 515 F.2d 57, 59-60, 68 (2d Cir. 1975).[8]

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[7] United States v. Caceres, supra, is not in any way inconsistent with these cases, as it never mentioned the Social Security Claims Manual, and this Court has never ruled that the Claims Manual is not binding on the Social Security Administration.

[8] 5 U.S.C. § 552 (a)(2)(C)(i) provides that provisions of agency staff manuals may be binding on a party if they have been indexed and either made available or published. Petitioner's own regulations indicate that the Claims Manual provision in question here comes within the statutory requirements, see 20 C.F.R. §§ 422.406(a)(4); 422.412; 422.430. Certainly, if the Claims Manual can bind a party, it is similarly binding on the agency. Thus, the suggestion that the only legally binding regulations are those published under 5 U.S.C. § 553 is incorrect.

The only exceptions this Court has recognized to the established doctrine that an agency is bound by its own regulations are when the regulation does not affect individual rights and is truly housekeeping, see American Farm Line v. Black Ball, 397 U.S. 532, 539 (1970), or in a criminal prosecution where the defendant seeks to expand the exclusionary rule by means of agency regulations. United States v. Caceres, supra. Neither of these exceptions are applicable here.

2. Even if the previously cited cases are not considered, the decision below is not inconsistent with the estoppel cases cited by Petitioner. See Petition at 11. None of these cases involved persons who were substantively eligible for statutory benefits, and whose entitlement was extinguished by agency action in violation of established agency rules, which were the dual conditions found by the Court of Appeals justifying the application of estoppel. (INS. v. Hibi, 414 U.S. 5 (1973) - No agency misconduct of any kind and thus no ground for ordinary estoppel, Montana v. Kennedy, 366 U.S. 308 (1961) - No agency misconduct of any kind and thus no ground for ordinary estoppel, and petitioner substantively ineligible for benefits sought; Automobile Club v. Commissioner, 353 U.S. 180 (1957) - Petitioner substantively ineligible for requested tax exempt status; FCIC v. Merrill, 332 U.S. 380 (1947) - Petitioner substantively ineligible for requested insurance; United States v. Stewart, 311 U.S. 60 (1940) - Petitioner substantively ineligible for requested tax exemption and no agency misconduct of any kind and thus no ground for ordinary estoppel; Wilber National Bank v. United States, 294 U.S. 120 (1935) - Petitioner substantively ineligible for requested insurance and no agency misconduct of any kind and thus no ground for ordinary estoppel; Utah v. United States, 284

U.S. 534 (1932) - No misconduct of any kind and thus no basis for ordinary estoppel; Sutton v. United States, 256 U.S. 575 (1921) - Petitioner substantively ineligible for relief requested and no agency misconduct of any kind and thus no ground for ordinary estoppel; Utah Power and Light Company v. United States, 243 U.S. 389 (1917) - Petitioner not substantively eligible to use land as requested; Pine River Logging Company v. United States, 186 U.S. 279 (1902) - Petitioner not substantively eligible to use land as requested; Hart v. United States, 95 U.S. 316 (1877) - Petitioner not substantively eligible for tax exemption).

The issue of substantive eligibility is important to all of these decisions. The case principally relied upon by both the Petitioner, and Judge Friendly in his dissent, is FCIC v. Merrill, supra, 332 U.S. at 385, where it was stated that it is ". . . [T]he duty of all courts to observe the conditions defined by Congress for charging the public treasury."

Here, as the court of appeals so compellingly noted, Respondent met the substantive conditions defined by Congress for charging the public treasury, and is among the class of persons Congress intended to benefit by its enactment of the Social Security program in question. (App. A of Petition 12a, 44a-46a). In response to Petitioner's argument that this decision will lead to the draining of the public fisc, Respondent submits that the limited nature of the decision, benefiting only those who are substantively eligible, will " . . . [n]ot drain the public fisc of $1.00 that is being spent either in excess of anticipated benefit levels or contrary to a substantive policy decision of the Congress." (App. A of Petition 46a).[9] Thus, the decision below is not "judicial legislation", but, rather

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[9]As noted earlier, supra n.3, it is not disputed that the Respondent was eligible for the benefits in question, and the written application requirement merely affects the date of her entitlement.

implements both the statute and congressional intent.

It is important to note that the only basis for the denial of benefits here was the Respondent's failure to satisfy a procedural regulation adopted by the Petitioner and not by Congress. All that Congress required in the statute was an application for benefits, and Congress' language is susceptible to an interpretation of either an oral application or a written application, as shown by the fact that the Petitioner in the past by regulation allowed oral applications and at the present time requires written applications. (See App. A of Petition 8a). This is not to suggest that the written application regulation is invalid or unreasonable, but simply to point out that Congress' mandate was simply that an application be filed, and that Petitioner herself has interpreted the statute at various times to allow both oral and written applications.

Petitioner argues that the written application requirement itself is a substantive policy decision of Congress.[10] As just noted this is not the case. Moreover, under principles set forth in Guaranty Trust Company v. York, 326 U.S. 99, 108-109 (1945) it is clear this is not so because the requirement is more closely analogous to the "means by which a right to recover . . . is enforced."

Respondent submits that the decision below is thus not in conflict with any of this Court's estoppel cases. See also, Moser v. United States, 341 U.S. 41 (1950).

3. Petitioner alleges that the decision below is in square conflict with the decisions of several other courts of appeals. This is not so. In Gressley v. Califano, 609 F.2d 1265

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[10] It should be noted that in Dziorny v. Secretary of HHS, No. 80-C0729 (ED NY Oct. 20, 1980), the Secretary admitted that the written application required was only a procedural requirement. Transcript of Court's opinion at 5.

(7th Cir. 1979) the Social Security claimant was not and had never been substantively eligible for benefits, and the court raised the question of whether the facts alleged were sufficient to create an estoppel even if estoppel could apply to the government. Moreover, the issue of the agency's noncompliance with its own regulation (i.e. Claims Manual § 2003), was not raised.

In Simons v. Califano, 593 F.2d 121 (9th Cir. 1979), in a brief per curiam opinion, the court held estoppel not to apply because there was no showing of any government misconduct. Once again, the issue of the agency's noncompliance with its own regulations was not raised. Moreover, the claimant in Simons did file a written application at the time in question and was also at least partially at fault in not reading the application form to catch the error. The Simons decision cannot fairly be construed as the Ninth Circuit's rejection of the principle that the government can be estopped in appropriate cases. See, California Pacific Bank v. Small Business Administration, 557 F.2d 218 (9th Cir. 1977); United States v. Lazy F.C. Ranch, 481 F.2d 985, 989 (9th Cir. 1973); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970).

In Leimbach v. Califano, 596 F.2d 300 (8th Cir. 1979), the court left open the issue of whether the government could be estopped if misconduct was shown, as the issue of the agency's noncompliance with its own regulation was not raised. Moreover, the court stressed the weakness of the facts and noted there was no substantial evidence to even support a finding that an oral inquiry was made.

Finally in Cheers v. Secretary, HEW, 610 F.2d 463 (7th Cir. 1979) cert. denied, No. 79-6856 (October 14, 1980), the court held

that there was no competent evidence of the alleged oral inquiry, and, once again, the issue of the agency's noncompliance with its own regulations was not raised. Moreover, in Petitioner's Brief in Opposition, at 6, arguing against granting a writ of certiorari in that case, Petitioner noted that the case did not involve a direct conflict with this case because of the absence of evidence of an oral inquiry.

Thus, on the facts and arguments presented in these four cases, there is no conflict with the holding in this case. None of the cases raised the issue of the agency's noncompliance with its own regulations, which is critical to a finding of a misconduct upon which the Hansen holding is based, and, in addition, the other decisions also involved claimants who were substantively ineligible for benefits (Gressley), or involved fact situations with inadequate proof of the alleged oral inquiry (Leimbach, Cheers).

On the law, the decision below is supported by the decisions in at least eight circuits, which have held that the government will be estopped in certain circumstances. See, App. A of Petition 37a-38a.

4. Finally, the Petitioner argues that the issue is important because it threatens the sound administration of the Social Security program and encourages groundless claims against the public treasury. Petition at 11, 17-19. In support of this it cites to five decisions subsequent to the decision below in which federal district courts have followed the ruling below.

It is submitted that these claims are groundless. Most significantly, the decision below is so limited in its application that none of the alleged harms can occur if the decision is

properly followed.[11] It must be stressed that the decision below is strictly limited to apply only where: (A) A claimant satisfies the substantive statutory eligibility requirements; and (B) The denial of benefits is based on a failure to satisfy a procedural requirement (written application) added by the agency and not Congress; and (C) The failure to satisfy the procedural requirement is caused by agency action in violation of the agency's own procedural manual; and (D) The procedural rule that is violated by the agency is directly related to the procedural requirement on which the denial was based; and (E) There is substantial evidence in the form of written agency records or otherwise, to document an oral inquiry regarding the claimed benefits by the claimant on a date certain; and (F) All the traditional requirements of estoppel are met.

If all of these conditions are satisfied, the only people who will gain from the decision are those whom Congress intended to receive benefits, and thus there cannot be a drain on the public fisc.

Moreover, the agency would have an effective means of rebutting fraudulent claims as the burden of proof would still be on the claimant to prove by substantial evidence the fact that an oral inquiry was made. If the oral inquiry cannot be verified, the claimant and not the agency would lose, under the decision below, as was the case in Cheers and Leimbach.

That this is quite manageable is borne out by examining the post-Hansen decisions cited by the Petitioner. In Golau v. Secretary, HHS, No. 79-3192 (DDC.May 29, 1980), there was written

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[11] Indeed, Judge Newman's concurrence below characterizes the substantive-procedural distinction set forth in the majority opinion as both an "explanatory" and a "limiting principle" in assessing the application of equitable estoppel against the government. The decisions of the District Courts referred to by Petitioner (Petition at 18) demonstrate the sound and measured exercise of judicial discretion in applying the principles of equitable estoppel established in Hansen to subsequent cases. See discussion, infra.

verification of the oral inquiry from the agency's own records, and there was competent evidence of government misconduct by the violation of an agency rule.[12] Similarly, in Braunstein v. Harris, 498 F. Supp. 1301 (DDC.1980), there was also written verification from agency records of the oral inquiry, and competent evidence of a violation of agency rules. In Coty v. Harris, 495 F.Supp. 452 (W.D. Va. 1980), the ALJ found as a fact that an oral inquiry was made on a date certain, and that there was competent evidence of agency misconduct by the violation of its own rules.[13] In Carpenito v. Secretary, HHS, No. 78-2798-K (D. Mass. May 29, 1980) there was evidence presented from witnesses of an oral inquiry regarding Social Security benefits, and the court simply remanded the case to the Secretary to make factual findings on whether an oral inquiry was made.

In Dziorny v. Secretary, HHS, supra, the court recognized the strict, limiting character of the Hansen decision requiring: reasonable reliance on misinformation from a government employee; a procedural, and not a substantive eligibility requirement in issue; and violation of an internal procedural manual or guide supporting an inference of misconduct. The court indicated that the record did not satisfy these criteria (the claimant appeared pro se) and simply remanded the case to the Secretary to take additional evidence to see if the claimant could meet her burden of proof.

Respondent submits these cases show how the decision below limits itself, and is manageable by the federal courts and the agency.

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[12]It should be noted that the Secretary had filed an appeal to the District of Columbia Circuit of this decision, but voluntarily dismissed her appeal.

[13]It should be noted that the Secretary had filed an appeal to the Fourth Circuit of this decision, but voluntarily dismissed her appeal.

In sum, the decision below is consistent with prior decisions of this Court, and is not in conflict with decisions of any other courts of appeal. Alternatively, the estoppel issue itself need not be reached as the decision can be affirmed on the ground that an agency is bound to follow its own regulations. Judge Friendly's vigorous dissent, on the law, is premised to a significant degree on a factual dispute which must be resolved against him if the writ were to be granted. Since review could thus turn on the analysis of the particular facts of the case, this is yet another reason to deny the Petition. Moreover, the decision not only does not threaten the sound administration of the Social Security program, but, as Judge Newman concluded "I concur not because the amount of money Mrs. Hansen seeks is small, but because it is only fair that it be paid." (App. A of Petition 47a).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Dated: 2/9/81

Zander B. Rubin, Esq.

Walter M. Morris, Jr., Esq.

Attorneys for Respondent

RESPONDENT'S APPENDIX A

Excerpts from transcript of Respondent's hearing before Administrative Law Judge 1a-10a

applications?

A. No, he was very short, very in a hurry.

Q. Did he suggest or encourage you in anyway to file a written application?

A. No, he did not.

Q. Did he explain to you the advantages of filing a written application?

A. No, he did not.

Q. Okay. And the reason you didn't file a written application at that time was what?

A. Because Mr. Connely told me that I wasn't illegible (sic) because I was divorced from my husband at the time of his death.

Q. And in your own mind, he made it very clear to you that you weren't eligible?

A. Yeah, I believed him.

RE-EXAMINATION OF CLAIMANT BY ADMINISTRATIVE LAW JUDGE:

Q. Do you remember exactly what he said?

A. Yes, I do.

Q. Tell me.

A. I was very put out because of the questions--

Q. Will you tell me what he said? Never mind about being put out.

A. He said me, "You were never married to the man, were you?"

Q All right, then what else did he say?

A Then he -- he said I was not illegible (sic) because I was divorced at the time of my husband's death. He said, "That's it, you were divorced. What was your marital statchus (sic)?"

Q All right.

ADMINISTRATIVE LAW JUDGE: Go ahead, Mr. Rubin.

CONTINUED EXAMINATION OF CLAIMANT BY MR. RUBIN:

Q Now, when you left Mr. Connely's office, did you talk to your mother right away?

A Yes, as soon as I came out the door.

Q And did you tell your mother what Mr. Connely had just said to you?

A Yes, I did.

Q Okay. Now, you've already testified as to why you filed in 1975, after receiving a booklet, is that correct?

A Yes, that is.

Q You mentioned that you called up this Enterprise-6039. Could you tell us what that is?

A That's Social Security office in Montpelier (phonetic), it's a toll-free number.

Q Uh-huh. And you -- when you made that telephone call, you -- what were you told?

A I was told that I was illegible (sic) for Mother's Benefits and had been since 1973, and I should go to the

ADMINISTRATIVE LAW JUDGE: And I won't go into the whether or not she's a divorced mother, the record will show that.

The Claimant, ANN RIEGEL HANSEN, having been first duly sworn, testified, as follows:

EXAMINATION BY ADMINISTRATIVE LAW JUDGE:

Q Going back to, Mrs. Hansen, May of '74, in the record you indicate that you talked to somebody in Newport or from Newport from the Social Security office, is that right?

A It was in June -- June 12th, your Honor.

Q All right, and was it -- was that person in Newport, or did you talk to him on the telephone -- how did you talk to him?

A I went into the Social Security office in Newport--

Q Uh-huh.

A --and spoke to the field man, Dan Connely (phonetic).

Q All right.

A And I went in to file a form for Mother's benefits -- Divorced Mother's Benefits.

Q All right, now, was he alone there?

A Yes, he was.

Q And was it in the morning, or afternoon, or when

was it?

A. No -- excuse me -- but it was in the afternoon, your Honor.

Q. And how long did you spend there?

A. It couldn't have been any longer than between 10 to 15 minutes, if it was that long.

Q. And did you discuss with him anything else other than filing that application?

A. No. He asked who I was, and I told him, "Ann Riegel Hansen" and that my boys had a claim there, two Riegel boys, and I -- I told him that I had heard that I was illegible (sic) for Divorced Mother's Benefits, I was not--

Q. That you were eligible or not?

A. That I was.

Q. All right.

A. And I was there to file a form,--

Q. Uh-huh.

A. --and he -- well, I (UNINTILLIGIBLE)--

Q. What did he tell you?

A. He asked me -- he said, "Were you ever married to the guy?" And I -- I just looked at him, and--

Q. What'd you tell him?

A. --he repeated the question again, because I was stunned, and I said, "Well, I can cross the street and go over to the City Clerk's office and get you a marriage

certificate." And he said, "Oh, no, no," he says, "that won't be necessary."

Q. All right, what else did he say?

A. And then he asked me what my marital statchus (sic) was at the time,--

Q. Uh-huh.

A. --"Were you divorced?" And I said, "Yes," and he said, "Well, that's it," his hands went up in the air, he said, "That's it then, that's why you're not illegible (sic)."

Q. Well, wait, did he say just, "That's it," or what else did he say, as near as you recall, after he said, "That's it," what -- what else did he say by way of explanation?

A. He said, "That's it, it's because you're divorced that you're not illegible (sic)."

Q. Did he say that you were not eligible?

A. He said I was not illegible (sic) to file a form for Mother's Benefits.

Q. Now, did he say the words that, "You aren't eligible?"

A. Yes, your Honor.

Q. Or did he just say, "That's it"?

A. He said, "That's it," and he said, "You're not illegible (sic) to file a form because you are divorced at the time."

Q. And did he give you any other explanation?

A. No, he didn't.

Q. Uh-huh. And was there anything else said at your meeting?

A. No.

Q. Either before or after the conversation that you're telling me now?

A. You mean while I was in Mr. Connely's office?

Q. Yes.

A. No.

Q. Any other discussion?

A. No, nothing else.

Q. And did you tell -- you told him you had a child or two--

A. I told him I had two sons.

Q. Uh-huh. Now, after that, when was the next contact that you made with the Social Security office or people?

A. In 1975.

Q. And do you remember what month?

A. Oh, gosh, I think it was May, your Honor.

Q. And that was in Newport?

A. Yes.

Q. And who did you see then?

A. I went back to the Social Security office after calling Enterprise-8539.

Q. What's that again?

Q How old, roughly?

A Oh, she was a middle-aged lady.

Q Tall or short, or fat or what?

A Oh, goodness, I think she was a little -- probably a little bit taller than I am -- I -- I can't tell you for sure, but--

Q Tell me this: You don't remember her name?

A No, I never asked her name, your Honor.

Q How do you remember Mr. Connely's name?

A Because he had given me a rude time.

Q A what?

A He had been rude to me.

Q Oh, you remember him because he was rude, you didn't remember the lady that took your application?

A No.

Q All right.

ADMINISTRATIVE LAW JUDGE: Go ahead, Mr. Rubin.

EXAMINATION BY MR. RUBIN:

Q When did your husband, Mr. Riegel, die?

ADMINISTPATIVE LAW JUDGE: We've got that -- we've got the death -- we got that.

BY MR. RUBIN:

Q And at the time of his death you were divorced, correct?

A Yes.

Baker, Humes & Burke Reporting, Inc.

Q And--

ADMINISTRATIVE LAW JUDGE: We have that, too.

BY MR. RUBIN:

Q Were you receiving support -- any support from him at the time of his death?

A No, I had never received support from him.

Q And the children started receiving benefits right after his death?

A Yes, shortly after.

Q Now, there came a time -- did there come a time when you went to the Social Security office to apply for benefits?

A Yes, in June of 1974.

Q And the Social Security contact sheets that are in evidence here list three names: Riegel, Riegel, and Hansen. Your last name is Hansen, is that correct?

A Yes.

Q And your two sons' last names are?

A Riegel.

Q And when you went into the Social Security office that day, did anyone go with you?

A My mother did.

Q And did she come into the room when you went in to speak to Mr. Connely?

A No.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Social Security Administration

TOE 110/120

Form Approved
OMB No. 72-R076

(Do not write in this space)

APPLICATION FOR MOTHER'S INSURANCE BENEFITS*

If you are applying as a widow, the information you furnish on this application will ordinarily be sufficient for a determination on the lump-sum death payment without the filing of any separate application.

1. Print name of deceased wage earner or self-employed person (*Herein referred to as the "deceased"*)	Enter his Social Security Number
Wallace M. Riegel Jr.	009 16 8115

I hereby apply for all insurance benefits payable to me under Title II of the Social Security Act, as amended.

2. Print your full name (*First name, middle initial, last name*)	Enter your Social Security Number (*If none or unknown, so indicate*)
Ann Riegel Hansen	009 24 7833

3. Enter your date of birth (*Show month, day, and year*)	Enter the name of the State or foreign country where you were born.
11-14-1937	Vermont

4. Enter your maiden name.
Dantagne

5. (a) Have you ever before filed an application for monthly social security benefits?	(b) Enter name of person on whose earnings record you filed other application.
☐ Yes (*If "Yes," answer (b), (c), (d), and (e).*) ☒ No (*If "No," go on to item 6.*)	

(c) Enter Social Security Number of person named in (b) (*If unknown, so indicate*)	(d) Are you now receiving benefits on this record?	(e) What kind of benefits are you receiving? (*For example, wife, disability, widow*)
— — | — — | — — — —	☐ Yes ☐ No	

6. (a) Are you so disabled now that you can't work, or was there some period during the last 14 months when you were so disabled that you could not work?	(b) Enter the date you became disabled (*Month, day, year*)
☐ Yes (*If "Yes" answer (b).*) ☒ No (*If "No" go on to item 7.*)	EXHIBIT 1

7. Enter below information about each of your marriages. Include information on your marriage to the deceased and any other marriages whether before or after you married the deceased.

	To whom married	When (*Mo., day, and year*)	Where (*Enter name of City and State*)
Your last marriage	Bruce Hansen	11-25-61	Newport
	How marriage ended	When (*Mo., day, and year*)	Where (*Enter name of City and State*)
	Divorce	4-16-64	Newport VT
Your next to last marriage	To whom married	When (*Mo., day, and year*)	Where (*Enter name of City and State*)
	Wallace Riegel Jr.	5-14-54	Newport VT
	How marriage ended	When (*Mo., day, and year*)	Where (*Enter name of City and State*)
	Divorce	4-8-60	Newport VT

(*Use "Remarks" space on last page for information about any other previous marriages.*)

*This may also be considered an application for survivors benefits under Section 5 of the Railroad Retirement Act and for Veterans Administration payments under Title 38 U.S.C. Veterans Benefits, Chapter 13 (which is, as such, an application for

SSN HOLDER: Wallace Riegel | W | M | 02/22/67

DIVIDEND | BASE PERIOD 50: 1951-1967 | SAE

EFF DATE	PIA	TYPE	MAX	EFF DATE	PIA	TYPE	MAX	EFF DATE	PIA	TYPE	MAX	EFF DATE	PIA	TYPE	MAX
05/74	218.30		370.90	06/74	226.50	1	384.70	06/75	240.70	1	415.50				

BIC	P F C	NAME OF CLAIMANT	DATE OF BIRTH	PF	DATE CLAIM FILED	S E C	RELATIONSHIP DATE	TYPE	REF SOCIAL SECURITY NO	S T A T	ENT DATE	E D C	BEN AMT	A D J	OTHER BEN AMT	A D J
E1		Ann R	11/14/37		05/07/75			DW	009-24-7833S		05/74		123.60 ~~165.00~~ 128.30			
											06/74		~~169.90~~			
2	S	WALLACE M	07/04/56		05/15/67						06/75		138.50			
											05/74		123.60			
											06/74		128.30			
1		MICHAEL C	04/29/58		05/15/67						06/75		138.50			
											05/74		123.60			
											06/74		128.30			
											06/75		138.50			

BENEFIT CONTINUITY FACTORS

BIC	YR	FAC	EARN	J 1	F 2	M 3	A 4	M 5	J 6	J 7	A 8	S 9	O 10	N 11	D 12

10a

7A. REP. PAYEE

TYPE	GDN	CUS	INST	NAM

8. LUMP SUM | F H EXPENSE

PAID AS FOLLOWS | REMAINS UNPAID

11. REMARKS | DO CODE

Montpelier Vt 024

~~MAX EXCEEDED ELIM OF SUPPORT REQ SC~~ AM AWD FOR C2 & C1 due to ent of E1 under sec 202(j)(1). To the extent cal. upto 163.80 and for 5/74 & 169.90 and for 6/74-6/75 for C2 & C1 protected under 202(j)(1)

CLAIMS REPRESENTATIVE: [signature] | DATE: 5/19/75

CLAIMS AUTHORIZER: [signature] | DATE: 5/15/75

This is to certify that this determination is based on supporting evidence on file [illegible] 6/4/75

J4

ENTITLEMENT DATA

BIC	NAME AND ADDRESS	DATE OF ENTITLEMENT	MONTHLY BENEFIT	LUMP-SUM DEATH PAYMENT
E1	47090A Ann R Hanson 59 Glen Rd Newport Vt 05855	05/74	123.80 123.60	
		06/74	~~169.90~~ 128.30	
	WALLACE M RIEGEL RR1 NEWPORT VT 05855	06/75	138.50	
		05/74	128.30	
		06/74	138.50	
	ANN R HANSEN GDN OF MICHAEL C RIEGEL 59 GLEN RD NEWPORT VT 05855	05/75	128.30	
		06/75	138.50	

EXHIBIT 2